Supreme Court, U. S.
FILED
JUL 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 77-17

CLARENCE M. SMALDONE, CAROL JEAN REEB, PAUL CLYDE VILLANO, ALICE WHALEN and CAROL JOYCE GARDNER,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Tenth Circuit

LEONARD E. DAVIES
DAVIES and SAINT-VELTRI
1034 Logan Street
Denver, Colorado 80203
Attorney for Petitioners
Reeb, Whalen and Gardner

IRL B. BARIS
721 Olive Street
St. Louis, Missouri 63101
Attorney for Petitioners
Smaldone and Villano

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	4
Statement	11
Reasons for Granting the Writ	17
I. Five-person gambling activity	17
II. Wiretap	27
III. Prior acts	34
IV. Leading questions on redirect examination	36
V. Disclosure of informants	39
VI. Address of witness	43
VII. Fifth Amendment privilege	45
Conclusion	49
Appendix A—Opinion of Court of Appeals, dated April 7, 1977	A-1
Appendix B—Judgment of Court of Appeals, dated April 7, 1977, re Smaldone	A-8
Appendix C—Judgment of Court of Appeals, dated April 7, 1977, re Reeb	A-10
Appendix D—Judgment of Court of Appeals, dated April 7, 1977, re Villano	A-12

Appendix E—Judgment of Court of Appeals, dated April 7, 1977, re Whalen A-14

Appendix F—Judgment of Court of Appeals, dated April 7, 1977, re Gardner A-16

Appendix G—Order of Court of Appeals, dated June 3, 1977, denying rehearing A-18

Citations

Cases

DeGesauldo v. Colorado, 364 P. 2d 374, 86 A.L.R. 2d 1435 (Colo. Sup. en banc 1961) 46, 47

Fletcher v. United States, 332 F. 2d 724 (D.C. Cir. 1964) 47

Giglio v. United States, 405 U.S. 150 (1972) 29

Mares v. United States, 383 F. 2d 805 (10th Cir. 1967) .. 35

Melton v. United States, 398 F. 2d 321 (10th Cir. 1968) 35, 47

Mills v. United States, 367 F. 2d 366 (10th Cir. 1966) .. 35

Namet v. United States, 373 U.S. 179 (1963) 48

Robbins v. Small, 371 F. 2d 793 (1st Cir. 1967), cert. den. 386 U.S. 1033 (1967) 47

Roviaro v. United States, 353 U.S. 53 (1957) 40, 41, 42

Sanders v. United States, 373 F. 2d 735 (9th Cir. 1967) .. 47

San Fratello v. United States, 340 F. 2d 560 (5th Cir. 1965) 47

Smith v. Illinois, 390 U.S. 129 (1968) 44, 45

United States v. Beathune, 529 F. 2d 696 (10th Cir. 1975) 34, 35

United States v. Bohn, 508 F. 2d 1145 (8th Cir. 1975) ... 21

United States v. Box, 530 F. 2d 1258 (5th Cir. 1976) 24

United States v. Bridges, 493 F. 2d 918 (5th Cir. 1974) .. 23, 24

United States v. Brodson, 393 F. Supp. 621 (E.D. Wisc. 1975) 28

United States v. Campagnuolo, No. WPB 75-36-CR-CF (S.D. Fla., Dec. 31, 1975) 28

United States v. Coppola, 479 F. 2d 1153 (10th Cir. 1973) 47

United States v. Dickens, 417 F. 2d 958 (8th Cir. 1969) .. 44

United States v. Giordano, 416 U.S. 505 (1974) 29, 32, 33

United States v. Kalustian, 529 F. 2d 585 (9th Cir. 1975) 31, 32, 33

United States v. King, 461 F. 2d 53 (8th Cir. 1972) 47

United States v. Leon, 534 F. 2d 667 (6th Cir. 1976) ... 25

United States v. Lyon, 397 F. 2d 505 (7th Cir. 1968) ... 45

United States v. Marrifield, 515 F. 2d 877 (5th Cir. 1975) 24

United States v. Martin, 526 F. 2d 485 (10th Cir. 1975) .. 48

United States v. Martinez, 487 F. 2d 973 (10th Cir. 1973) 41

United States v. Maloney, 262 F. 2d 535 (2nd Cir. 1959) 47

United States v. McCoy, 539 F. 2d 1050 (5th Cir. 1976) 25

United States v. Palermo, 410 F. 2d 468 (7th Cir. 1969) 44

United States v. Pepe, 512 F. 2d 1129 (3rd Cir. 1975) ... 22

United States v. Quinn, 543 F. 2d 640 (8th Cir. 1976) ... 48

United States v. Smaldone, 485 F. 2d 1333 (10th Cir. 1973) 35

United States v. Tarter, 522 F. 2d 520 (6th Cir. 1975) ... 24

United States v. Todaro, 550 F. 2d 1300 (2nd Cir. 1977) 25

United States v. Turzitti, 547 F. 2d 1003 (7th Cir. 1977) . 25

United States v. Varelli, 407 F. 2d 735 (7th Cir. 1969) .. 45

Constitutional Provisions

Fifth Amendment, Constitution of United States . . 4, 45, 46, 47
Sixth Amendment, Constitution of United States 4

Statutes

Title 18, United States Code, § 1955 2, 5, 11, 12, 17, 23, 26, 35
Title 18, United States Code, § 2517(5) 5, 27, 28
Title 18, United States Code, § 2518(1)(c) 7, 27, 29, 31
Title 18, United States Code, § 2518(7)(b) 8, 27, 28
Title 18, United States Code, § 2518(8)(d) 9, 28
Title 18, United States Code, § 2518(9) 9, 28
Title 18, United States Code, § 6001 et seq. 45
Title 28, United States Code, § 1254(1) 2

Rules

Rule 404(b), Rederal Rules of Evidence 10, 35, 36
Rule 611(c), Federal Rules of Evidence . . 3, 11, 36, 37, 38, 39

Miscellaneous

ABA Project on Standards Relating to the Prosecution Function, § 5.7(c) 48
Annotation, "Prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense with which accused is charged," 86 A.L.R. 2d 1443 47
Weinstein, Federal Rules of Evidence, para. 404[08], pages 404-40 36
Weinstein, Federal Rules of Evidence, para. 404[09], pages 404-57 36

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. . . . . .

CLARENCE M. SMALDONE, CAROL JEAN REEB, PAUL CLYDE VILLANO, ALICE WHALEN and CAROL JOYCE GARDNER,
Petitioners,

vs.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Tenth Circuit

Clarence M. Smaldone, Carol Jean Reeb, Paul Clyde Villano, Alice Whalen and Carol Joyce Gardner, your petitioners, respectfully pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on April 7, 1977.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Tenth Circuit on April 7, 1977, in an

opinion which has not yet been officially reported. The opinion is reproduced as Appendix A hereto.

On June 3, 1977, the Court of Appeals denied petitioners' petition for rehearing and suggestion of appropriateness of rehearing in banc. (See Appendix G.) No opinion was written and the order has not been officially reported.

JURISDICTION

The judgments of the United States Court of Appeals were entered on April 7, 1977. (See Appendix B, C, D, E, and F.) A timely petition for rehearing with suggestions of appropriateness of rehearing in banc was denied on June 3, 1977. (See Appendix G.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

In a prosecution for violation of 18 U.S.C. § 1955, what persons having some contact with a gambling business are to be counted in determining whether there are the statutorily required "five or more persons" and the thirty-day continuous operation.

II

Whether wiretap evidence should have been suppressed because the authorization related to a different offense, no inventory was furnished, and the affidavit failed to show use of other investigative techniques.

III

Whether evidence of defendant conduct prior to dates alleged in the indictment was erroneously received in evidence.

IV

Whether the prosecutor was erroneously permitted to cross-examine and ask leading questions on redirect examination of government witnesses, as a result of the trial Court's misinterpretation of Rule 611(c) of the Federal Rules of Evidence.

V

Whether the identity of informants should have been disclosed to petitioners.

VI

Whether the residence address of a witness is a proper subject of inquiry on cross-examination.

VII

Whether the prosecutor's deliberate extraction of the invocation of the privilege against self-incrimination by a crucial government witness in front of the jury was prejudicial error.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States

Fifth Amendment.

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statutes of the United States

Title 18, United States Code

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications.

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * * * * * * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * * * * * * *

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evi-

dence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

Federal Rules of Evidence

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 611.—Mode and Order of Interrogation and Presentation

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in

the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

STATEMENT

Petitioners Clarence M. Smaldone, Carol Jean Reeb, Paul Clyde Villano, Alice Whalen and Carol Joyce Gardner were convicted on various counts of a three-count indictment alleging violations of Title 18, United States Code, §§ 1955 and 2 (R XVII 1).[1] Petitioners were tried jointly with Larry Scott Owens, whose motion for judgment of acquittal was sustained at the close of the government's case (Tr. 1571), and with Joseph Nicholas Raso, who was acquitted by verdict of the jury (Tr. 1732). Petitioners filed separate notices of appeal (R XVII 120-124), and the appeals were consolidated. Petitioners filed a joint brief in the Court of Appeals, which issued a single opinion disposing of their appeals (See Appendix A.)

The language of each of the three counts of the indictment were identical, except for the dates and persons allegedly involved. Each count charged that during the period designated

---

[1] The original record filed in the Court of Appeals and certified to this Court consisted of 17 separate volumes, of which Volumes VI through XV are the transcripts of the trial proceedings (and a master index thereof). References to the record (R) in this petition shall be to the volume (in Roman numeral) and the page (in Arabic numeral), except, however, that references to the proceedings during the trial contained in Volumes VII through XV of the record will be merely to the transcript (Tr.) and the page (in Arabic numeral). (The pages of the transcript of trial proceedings are numbered in numerical order from 1 through 1736 in the nine volumes which comprise the trial transcript.)

"in the State and District of Colorado," certain named defendants and other persons named but not defendants "and diverse other persons, did knowingly and wilfully conduct, finance, manage, supervise, direct, and own an illegal gambling business, such business being in substantially continuous operation for a period in excess of thirty days and having a gross revenue of two thousand dollars ($2,000.00) or more, on one or more single days, involving five or more persons in its conduct, finance, management, supervision, direction, and ownership, and being in violation of" certain gambling statutes of the State of Colorado. "All of the foregoing in violation of Sections 1955 and 2, Title 18, United States Code."

The dates and persons involved, as alleged in the indictment, were as follows (all dates were "on or about"):

Count	Date	Persons Involved
I	8/1/74 to 5/1/75	Smaldone (aka Chauncey) Reeb (aka Jean, aka Mary) Villano (aka Paulie) Whalen (aka Gloria, aka Alice) Owens (aka Jack) Larry Lay (aka Gary) George Iantorno
II	8/1/73 to 1/31/74	Smaldone (aka Chauncey) Reeb (aka Jean, aka Mary) Gardner Ellis Smith Kenneth Ziegler (aka Carl)
III	8/1/72 to 1/31/73	Smaldone (aka Chauncey) Reeb (aka Jean, aka Mary) Gardner Villano (aka Paulie) Raso (aka Chubby) David Waters (aka Pete)

Various pre-trial motions were considered by the Court (Hon. Fred M. Winner, District Judge), and eventually the cause was transferred from Denver to Grand Junction, Colorado, for trial. Trial commenced on Monday, November 10, 1975 (Tr. 4) before Judge Winner, and lasted for approximately two weeks. The cause was submitted to the jury on Thursday, November 20, 1975 (Tr. 1721), after final arguments on November 19 and 20, 1975 (Tr. 1582-1690), followed by the Court's instructions (Tr. 1690-1715).

The jury deliberated for the greater part of two days and returned the following verdicts against the six defendants as to whom the case was submitted (R XVII 110-114, Tr. 1731-1732):

Defendant	Count I	Count II	Count III
Smaldone	Not guilty	Not guilty[2]	Guilty
Reeb	Guilty	Guilty	Guilty
Villano	Not guilty	Not charged[2]	Guilty
Whalen	Guilty	Not charged	Not charged
Gardner	Not charged	Guilty	Guilty
Raso	Not charged	Not charged	Not guilty

Most of the evidence in the case came from witnesses and exhibits produced by the prosecution. The only defense evidence consisted of portions of a transcript of grand jury testimony of Kenneth Ziegler which pertained generally to Count II (Tr. 1578-1581). The evidence tended to show the following:

Most of the government witnesses, except for law enforcement officers (Ouseley, Stefanik, Malone, Amman, Maes, Mc-

[2] The first paragraph of the Tenth Circuit opinion herein states that petitioners Smaldone and Villano were convicted of the charges in Count II. This error was called to the Court's attention in the petition for rehearing, but was not corrected.

Namee, Dore, Foster, Growney), identifiers of records (Willey, Quivey, Godwin-Austin, Suther, Meakins, Vidano, Veto), and miscellaneous witnesses (Marie Smith, Specht, Fetzer, Mailo, Torrez, Chappel, Brouwer), were bettors (Rotola, Wilscam, Woodward, Shaner, Zolier, Greenstein, Joseph, Nelson, G. O'Brien, Winterton, Brock, Curtis, Parness, Altberger, M. O'Brien, Duman, Katchen, Kippur, Agren, Coggan, Stewart, Shaklee, Ahrens, Vinland, Zinn, Crancer, Apostolakis, Pappas), persons who worked in the alleged bookmaking operation as phone men (Waters and Lay), or independent bookmakers (Ellis Smith and Iantorno).

Many bettors testified to contact with the phone men and some of the defendants. The prosecution contended that Woodward and Shaner were participants in the gambling operation. Their testimony indicated that they were bettors and on occasion may have gathered bets from friends which they in turn transmitted to the subject gambling operation.

There was considerable testimony from law enforcement officers and bettors as to the operation of a gambling business, including the methods of placing bets, point spreads, line information, vigorish, and layoff betting. Also in evidence were wiretapped telephone conversations between persons identified as petitioner Reeb and John Salanitro of Omaha (Govt. Exh. 118 and 119), the prosecution claiming that Mr. Salanitro was a part of the gambling operation.

The evidence indicated that after bets were placed, settlements were made, often with women who were identified by some witnesses as petitioners Reeb, Whalen and Gardner. The evidence also indicated that the phone men and settlement people used fictitious names, but there was no effort to conceal the identities of petitioners Villano or Smaldone. The evidence also tended to indicate, as to Count III, that petitioner Villano was involved in gambling activities until just prior to September 20, 1972, when he began the servitce of a state jail sentence,

and thereafter petitioner Smaldone became involved in gambling activities.

There are issues in this petition relating to the conduct of the trial, as well as an issue of whether a submissible case was made. The factual background of these issues are developed more fully in the Reasons section of this petition.

At the close of the prosecution's case petitioners' motions for judgment of acquittal were overruled, except for that of defendant Owens (Tr. 1571). As previously indicated, the only evidence offered by petitioners consisted of excerpts from the transcript of grand jury testimony of Kenneth Ziegler, who did not testify at the trial (Tr. 1578-1581). The cause was submitted to the jury on all three counts, and the jury, after deliberating for two days, returned verdicts finding petitioners guilty and not guilty as previously indicated (R XVII 110-114, Tr. 1731-1732).

Subsequent to the convictions, a hearing was held on certain wiretap issues pertaining to the Omaha wiretaps. The motion to suppress the wiretaps was overruled, and petitioners were sentenced on January 23, 1976, as follows (R XVII 115-119):

Petitioner Smaldone—four years and a fine of $15,000.00;

Petitioner Reeb—four years on all three counts, to run concurrently, and a fine of $7,500.00;

Petitioner Villano—four years and a fine of $15,000.00;

Petitioner Whalen—five years imprisonment, but all except six months suspended with 4½ years probation, and a fine of $3,000.00;

Petitioner Gardner—five years imprisonment on Counts II and III, to run concurrently, but all except six months suspended with 4½ years probation, and a fine of $3,000.00.

Thereafter, each petitioner duly filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit (R XVII 120-124), and petitioners remained at liberty on bond pending appeal to the Court of Appeals. On April 7, 1977, a panel of the Court of Appeals filed an opinion (Appendix A) affirming the convictions. Petitioners' timely petition for rehearing and suggestion of appropriateness of rehearing in banc was denied on June 3, 1977. (See Appendix G.) On June 21, 1977, petitioners' motion for stay of mandate was denied by the Court of Appeals, and petitioners are, at this writing, making arrangements for surrender to commence service of their respective sentences.

This joint petition for a writ of certiorari seeks to review the judgments of the Court of Appeals affirming petitioners' convictions.

REASONS FOR GRANTING THE WRIT

I

Five-person gambling activity

If petitioners were involved in a gambling activity in violation of the laws of Colorado, such violation would in and of itself not constitute a federal offense under 18 U.S.C. § 1955, unless the gambling business also involved "five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business". Thus, it was incumbent upon the prosecution to prove the participation of five or more persons. Unfortunately, there is considerable confusion and conflict among decisions of Courts of Appeals which have attempted to define what persons may be counted to determine whether there are the statutorily required five; this petition presents an opportunity for this Court to give much-needed direction in this area of the criminal law.

We recognize that persons may have different connections with a gambling business. As to some, there can be no question of their participation, such as those who operate telephones and receive bets, and those who handle the financial end of the business, such as collections and payments. Likewise, there can be no question of not counting certain people, such as bettors; the prosecutor acknowledged this in his closing argument (Tr. 1587), and the Court so instructed (Tr. 1699). But there are others in contact with the business who may or may not be included within the count of five—depending upon their precise activities. For example, a newspaper's publication of odds or point spreads would not make it a participant, whereas a person involved in the operation might supply the same information and be counted.

Case law hereafter cited recognizes that distinctions must be made as to the participation of persons in a business activity. In the trial of this case, however, the precise activities were overlooked, and in the evidence, argument and instructions, there were no delineations of the various categories which may or may not be included. The Court of Appeals adopted the errors of the trial Court. As a result, the convictions in this case resulted from the jury's being directed to include persons who must not under the law be counted in determining whether there are five or more participants.

As an example, there were numerous witnesses who testified to placing bets with phone men who, according to the evidence, were associated with some of the petitioners. There were others, such as Ellis Smith (Tr. 731) and George Iantorno (Tr. 1006), who accepted bets in their own business and were obviously independent contractors. In fact, Smith testified that he "was working as an independent" (Tr. 737), and never intended to be a partner with the phone man (Tr. 752-753). The fact that they laid off some of their own bets, and had to pay the vigorish on the lay-offs (Tr. 748), would put them in the category of a mere bettor of the people accepting the lay-off bets, and not a participant. In the category of bettors, there were also persons such as Jerry Woodward (Tr. 280) and Jack Shaner (Tr. 306) who may have collected bets for others as a conduit (Tr. 298, 300) and then placed them with the subject operation. These men testified they were not bookmakers (Tr. 301, 350).

In closing argument, government counsel emphasized his version as to how to count the number of participants. With reference to 1972 (Count III), he said there were about 9 or 10 participants and mentioned them as follows (Tr. 1586-1591): Waters (a phone man), petitioner Villano, petitioner Smaldone, Tom, Shaner, Woodward, petitioner Gardner, defendant Raso (who was acquitted), petitioner Reeb, Mary Ann (who may have been petitioner Reeb—Tr. 1590), and Nick (who may have been defendant Raso).

With reference to 1973 (Count II), the prosecutor again counted the number of participants (Tr. 1591-1598), and included Salanitro and Cappellano (both of Omaha), petitioner Reeb, an unidentified "he", Ziegler (the phone man also known as Tim and Carl), petitioner Smaldone (solely because he helped to arrange bond for Ziegler, but petitioner Smaldone was acquitted), Ellis Smith, McCandless (who worked for Smith), Dennis Valley, and petitioner Gardner.

With reference to 1974 (Count I), the prosecutor listed the following as participants (Tr. 1598-1602): Larry Lay, Mike, petitioner Reeb, petitioner Whalen, Iantorno, petitioner Smaldone (who was acquitted), petitioner Villano (who was acquitted), and Jack.

The prosecutor's recitation of those whom he included in counting to five or more did not coincide with the allegations of the indictment. As to 1972, the indictment charged petitioners Smaldone, Reeb (a/k/a Jean and Mary), Gardner, Villano, defendant Raso (a/k/a Chubby), and Waters (a/k/a Pete). As to 1973, the indictment charged petitioners Smaldone, Reeb (a/k/a Jean and Mary) and Gardner, and Ellis Smith and Ziegler (a/k/a Carl). As to 1974, the indictment charged petitioners Smaldone, Reeb (a/k/a Jean and Mary), Villano, Whalen (a/k/a Gloria), defendant Owens (a/k/a Jack), and Lay (a/k/a Gary), and Iantorno.

When the District Court instructed about the nature of the offense, it first defined the term "conduct" as follows (Tr. 1699):

> "As used in the statute, the term 'conduct' means to operate, carry on, cause to function, or to play any role in the furtherance of the gambling business, whether the defendant is on the highest or the lowest level of activity. The term includes everyone who participates in the operation of the gambling business, regardless of how minor his or her role may be, and whether or not that person

is labeled or termed an agent, a runner, a collector, a salesman, a phone man, a clerk, lookout, independent contractor, layoff man, or some similar term.

"The only person not included is a mere bettor who is entitled simply to his own winnings on his wagers, and who did not otherwise participate in the gambling business. As used in the statute, the term 'finance', 'manage', 'supervise', 'direct', and 'own', are simply given their normal accepted meaning."

Then the Court went on to further discuss the rule of five as follows (Tr. 1700-1701):

"It is not required that the government charge five or more persons in any single count of the indictment. The government is not required to name five or more persons who may have conducted, financed, managed, supervised, directed, or owned the alleged gambling business. But the government must prove beyond a reasonable doubt that the defendant under consideration was involved in an illegal gambling business with four or more persons, whether named as codefendants or whether named in the indictment or whether or not named at all.

"The government must prove beyond a reasonable doubt that, as to each defendant, there were five persons involved including the defendant under consideration. If you find that any person named as a defendant in the counts was engaged in the conduct of an illegal gambling business, at least in part, it doesn't matter that that person or that defendant may not have known all of the participants in that business.

"It doesn't matter that that defendant or that person may not have known that the business was conducted by five or more persons. If the defendant conducted part of

the gambling business, that defendant ran the risk that it might involve five or more persons."[3]

Thus, by virtue of the prosecutor's argument to the jury, sanctioned and approved in effect by the Court's instructions, the jury was directed to include many persons, who should not have been so included, in the determination of the crucial issue of whether there were five participants. Had the jury not been able to count people who were not involved in the gambling operations under scrutiny, there would not have been five persons in any of the three years. Under the law, the evidence was insufficient for submission of the case to the jury.

There is conflict among decisions as to what persons may be included within the group consisting of five for purposes of § 1955. But even those cases which have granted the widest latitude for inclusion of persons in the group do not justify the broad scope of participants which characterized the prosecution theory in this case, with the sanction of the Court's instructions. Although *United States v. Bohn*, 508 F. 2d 1145 (8th Cir. 1975), cited in the opinion herein, authorizes the inclusion of some people who we feel should not be counted, nevertheless an individual who placed a bet with the bookmaking operation for the benefit of another party (such as Woodward and Shaner here) was not included in the operation. Thus, the Eighth Circuit said (l.c. 1150):

"The government argues that the conversations indicate that at least $50.00 of the bet was placed with the Kleve

---

[3] In the second paragraph of the opinion herein, the Tenth Circuit states that petitioners "do not question the correctness of the jury instructions." Petitioners did, indeed, object to the instructions, particularly as to being overbroad, including many persons within the alleged illegal activity who should not have been included, failure to define certain terms, and not including a requirement that a defendant be involved at particular periods of time (Tr. 1717). In addition, the thrust of the argument before the Tenth Circuit, as it is here, was that many persons were included in the count for five participants who should not have been included, and that the instructions directed the jury to do so.

book by Sierbinski for another party. They would have us hold that this single fact is sufficient to classify Sierbinski as a bookmaker and to sustain his conviction on the basis of this classification. We are unwilling to go that far."

Sierbinski in that case was no different from Woodward and Shaner in the instant case. Neither of them was a bookmaker giving odds and receiving the bookmaker's percentage. In fact, they each disclaimed any intention to be considered as bookmakers (Tr. 301, 350); they were nothing more than conduits for the placing of bets (Tr. 298, 300).[4]

In *United States v. Pepe*, 512 F. 2d 1129 (3rd Cir. 1975), the Court reversed and remanded because there was not the requisite number of persons involved in the gambling operation. Note particularly (as to Woodward and Shaner) the reference in footnote 10 of the *Pepe* case to an "accommodation bettor", who the Court finds to be "a non-participant in the . . . gambling operation." The Third Circuit in the *Pepe* case would not indulge in "speculation and generalized theories" as to the existence of other persons, but the Tenth Circuit

[4] At the end of the third paragraph, the opinion of the Tenth Circuit herein states that "even without Shaner and Woodward there is sufficient evidence to establish a participation by five others in Count III." Even if the Court of Appeals believed that there was evidence as to five others, nevertheless the jury could have found that there were only three or four others, and by erroneously including Shaner and Woodward, they would have convicted. The jury found petitioners Smaldone, Reeb, Villano and Gardner guilty as to Count III; it should be borne in mind, however, that Smaldone and Villano did not participate at the same time. If Waters is added to the group, then there are only four at any one time, unless Shaner and Woodward are to be included. The opinion is further in error in stating two paragraphs later that there was "evidence to support a finding that Woodward and Shaner were employees of the gambling operation"; the only evidence was that they collected information as to bets from friends associated with them and then placed the bets, as bettors, with persons allegedly associated with petitioners. They were not employees—just bettors.

herein has apparently done so in affirming the trial Court's sanction of the prosecutor's speculation.

United States v. Bridges, 493 F. 2d 918 (5th Cir. 1974), is also applicable to the instant case, particularly to Count III for the year 1972. The Court there decided a question of first impression (l.c. 921): "whether the gambling business must operate with five people for a period in excess of thirty days." After examining legislative history, the Court concluded that § 1955 was not adopted to "subject almost any small gambling operation to federal regulation." The Fifth Circuit continued (l.c. 922):

> "The quantitative requirements that the business be conducted by at least five persons and be in operation for a period in excess of thirty days furnish a more sensible standard for measuring substantiality if they are construed conjointly. Size and continuity, when found together in the propositions established by Congress, demonstrate that a gambling enterprise is of sufficient magnitude to warrant federal regulation. (Cases cited.) Viewed in light of the congressional intent to bring within federal criminal legislation not all gambling,[6] but only that above a certain minimum level, a construction of the statute that fuses the size and continuity elements of the standard for determining what is an illegal gambling business seems most appropriate."

The Fifth Circuit in the *Bridges* case requires proof of a minimum of five persons for a period in excess of thirty days; the Tenth Circuit herein is in conflict because the submission of the instant case did not impose a similar requirement. Furthermore, the *Bridges* case is important to avoid counting petitioners Smaldone and Villano together for Count III, because the evidence not only failed to indicate that they were in the operation together for a period of thirty days but, in fact, was to the contrary; the inference was just the opposite because the most that

could be said of the government's evidence is that Smaldone succeeded to the participation after Villano left for jail. Thus, it is improper, as government counsel did, to count both Villano and Smaldone to reach the number five. The Tenth Circuit acknowledges that it is in conflict with the Fifth Circuit *Bridges* case on this issue. Furthermore, there was no evidence that any of the women defendants, particularly Gardner and Whalen, had ever been involved for thirty days. See also *United States v. Marrifield*, 515 F. 2d 877 (5th Cir. 1975), and *United States v. Tarter*, 522 F. 2d 520, 526-527 (6th Cir. 1975).

A recent decision of the Fifth Circuit is also in conflict with the Tenth Circuit decision herein. In *United States v. Box*, 530 F. 2d 1258 (5th Cir. 1976), the Court first summarized the nature of a bookmaking operation, and, after discussing layoff betting, concluded (l.c. 1262):

> "The point of all this is that a 'lay off' bet should be defined solely in relation to the occupation and the purpose of the person making the bet—the occupation and motives of the person accepting the bet are irrelevant to the definition."

After discussing the evidence pertaining to the defendant Box, the Court then examined the issue as to whether he was a bookmaker and ruled that the jury could not conclude that he was. There was no evidence that Box (and in this case men such as Shaner and Woodward) had any customers as such. The mere fact that Box may have participated in a layoff bet did not constitute him a bookmaker, and the person participating in a layoff bet could be just a bettor and not a bookmaker. Even though the Court suggested (l.c. 1264) that his "acceptance of lay off bets arguably makes him more important to the operation of a bookmaking business than would be a mere customer", the Court, after examining the legislative history of § 1955, concluded that there must be more than just the acceptance of layoff bets, and the Fifth Circuit found that the recipient of the layoff bet was not a necessary or integral part of a gambling operation.

Another recent case of interest is *United States v. Leon*, 534 F. 2d 667 (6th Cir. 1976), in which the conviction of one bookmaker (Bourgeois) was reversed even though he accepted layoff bets and exchanged line information. The wiretap conversations there were apparently very similar to those in the instant case between petitioner Reeb and the Omaha person. The language in the *Leon* decision (l.c. 677) is equally applicable here:

> "After a careful examination of the recordings, we find it impossible to conclude from them that Bourgeois [Salanitro] had an interest in the welfare of the business conducted by Leon [Reeb] or that Bourgeois' [Salanitro's] gambling activity was a part of the business conducted by Leon and Miller [Reeb and her associates]."

The attempt by the Tenth Circuit herein to distinguish the *Leon* case is unsuccessful; instead it points up the conflict between the Sixth and Tenth Circuits. See also *United States v. Todaro*, 550 F. 2nd 1300 (2nd Cir. 1977).

The Tenth Circuit is also in conflict with some of the principles announced recently in *United States v. McCoy*, 539 F. 2d 1050 (5th Cir. 1976), and *United States v. Turzitti*, 547 F. 2d 1003 (7th Cir. 1977). These cases recognize that evidence of bets between bookmakers does not automatically require that each such bookmaker be included in the count for five. In many such instances, even if such a bet is called a lay-off bet, it is nothing more than a simple bet, and bettors must not be counted.

We believe that the foregoing cases demonstrate that the Tenth Circuit is in conflict with other Circuits, and that just because a person places or accepts layoff bets (such as Iantorno,

Smith, and the Omaha people), he is not necessarily to be considered a part of the gambling operation. There must be additional evidence, which there was not in the instant case, to bring him into the group to be considered in determining whether there are five members. Furthermore, the cases from other circuits indicate that the mere fact that someone may be placing bets as a matter of convenience to others would not take him out of the realm of an ordinary bettor and include him within the gambling operation.

There was no evidence that Woodward, Shaner, Iantorno, Smith, or the Omaha people received any commission or favorable treatment for their participation, or any share of the profits or burden of the losses, except that pertaining to the normal bettor. The prosecution's theory and the Court's instructions provided an opportunity for the jury to include persons who should not have been counted in determining whether there was a federally prohibited gambling operation.

Opinions are being reported with almost daily frequency attempting to construe 18 U.S.C. § 1955. The Tenth Circuit opinion herein has added to the confusion as to how the statute should be applied. Definitive guidelines should be established to aid District Courts.

Because this case involves in one case many recurring factual situations (accommodation bettors, lay-off betting in both directions, independent contractors, peripheral participants, line information exchanges, etc.), all of which should be clarified for future application in this often-used area of federal prosecutions, and because of the conflict of the opinion herein with numerous decisions of other Circuits, we respectfully suggest that this case presents an opportunity to establish needed guidelines, and that certiorari should be granted as to this Question.

II

Wiretap

In its evidence regarding Count II of the indictment, the prosecution introduced taped recordings of telephone conversations between petitioner Carol Jean Reeb and a person identified as John Salanitro in Omaha, Nebraska. (See Govt. Exh. 118 and 119.) These telephone conversations occurred in 1973 on November 10, 11 (two conversations), 12, 15, 16, 17 (four conversations), 19 and 20. The conversations were intercepted pursuant to an Order issued by United States District Judge Robert Van Pelt in Omaha, Nebraska.

The documents filed with Judge Van Pelt were made available to counsel and are a part of the record in this case. Three points were made by petitioners in arguing for suppression of the evidence gained through this wiretapping:

> *First*, the information used to prosecute petitioner Reeb related to another offense, as contemplated by 18 U.S.C. § 2517(5), and required an additional application to the Court for its use.
>
> *Second*, the government failed to comply with 18 U.S.C. § 2518(7)(b) in not furnishing petitioner Reeb with an inventory of the intercepted communications.
>
> *Third*, the affidavit filed in support of the application for the wiretap was insufficient under 18 U.S.C. § 2518(1)(c).

A. This is a separate offense contemplated by 18 U.S.C. § 2517(5).

The issue here is quite simple: When the pertinent portion of § 2517(5) discusses separate offense, does it include the situation in this case where the prosecution is for violation of

the same statutory offense as that set forth in the original wiretap application, but the wiretap is used for prosecution against a defendant who was not contemplated in the original application but who resides in a separate geographic area and is allegedly engaged in conduct separate and distinct from that referred to in the original application.

We assert the position that "separate offense" as used in 18 U.S.C. § 2517(5) contemplates a different factual offense (as is involved here) as well as a different statutory offense, and thus requires separate application for its use. See *United States v. Brodson*, 393 F. Supp. 621 (E.D. Wisc. 1975), and *United States v. Campagnuolo*, No. WPB 75-36-CR-CF (S.D. Fla., Dec. 31, 1975).

B. The failure to file an inventory violated 18 U.S.C. § 2518 (7) (b).

The language of the statute is mandatory; however, it was not complied with in this case. The prosecution argued before the District Court that the identity of petitioner Reeb's voice was "not known to any representative of the *Department of Justice in Denver* . . . until last Friday" (emphasis supplied) (Tr. Hearing on Motions and Sentencing, p. 24), that disclosure of the documents filed with Judge Van Pelt authorizing the wiretap was a compliance with the inventory requirements, and that compliance with 18 U.S.C. § 2518(9) satisfied 18 U.S.C. § 2518(8)(d). (Ibid, p. 27).

One question that comes to mind is whether the government's statement regarding the knowledge of a Justice Department representative in Denver means that other Justice Department representatives in fact knew of the identification of petitioner Reeb before the date of disclosure. It is a fact that the trial of this case was conducted by Justice Department representatives from Kansas City and Omaha as opposed to those from the Department of Justice in Denver.

It stretches the imagination to believe that the identity of Ms. Reeb was not known by anyone connected with the case, especially when we consider that the affidavit in support of the application for a wiretap made in November of 1973, specifically refers to the "Smaldones" in Denver. Compare *Giglio v. United States*, 405 U.S. 150 (1972).

Nevertheless, assuming counsel for the government in Kansas City and Omaha were unaware of the identity of Ms. Reeb until the Friday before October 28, they were still obligated to comply with the law by filing an inventory.

C. The affidavit of Edward D. O'Brien is insufficient.

18 U.S.C. § 2518(1)(c) sets forth certain requirements to be met before a District Judge may permit the drastic intrusion of a wiretap. It requires the affidavit to set forth:

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The affidavit filed by Agent O'Brien fails to meet this requirement of the statute.

The affidavit is quite lengthy. However, a lengthy list of conclusions should not substitute for a brief but adequate statement of facts. Its primary weakness is its failure to support its conclusion that other investigative techniques have either been tried or would not succeed or be too dangerous. In *United States v. Giordano*, 416 U.S. 505 (1974), this Court said:

> "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where

> the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

It is the position of petitioners that Agent O'Brien's affidavit is conclusionary and does not present facts from which Judge Van Pelt could determine whether "normal investigative procedures" were viable alternatives to electronic surveillance. Certainly the mere assertion that informants and betting customers are unwilling to testify is insufficient to excuse the use of a more normal technique of subpoena before a grand jury or the granting of immunity. This is particularly true when measured against the situation in this case where more than a dozen witnesses testified who were bettors, employees, and informants.

Agent O'Brien's recitation on pages 23 and 24 of his affidavit as to why other investigative techniques would not work is conclusionary in almost every aspect and is shown to be false when measured against the fact that the instant case was brought to trial without use of electronic surveillance. It is difficult to believe that normal investigative techniques work so well when used by the authorities in Colorado and fail so abysmally when used in Nebraska.

It is not until page 23 of the affidavit that Agent O'Brien turns his attention to the issue of normal investigative techniques and why they will not work. He states that gambling customers are ". . . often unwilling . . ." to cooperate, especially when the person is a professional gambler and is ". . . requested to give information . . ." He further concludes that he and his fellow officers had been unable, up to the date of the affidavit, to bring charges using usual techniques and that he has a *good faith belief that usual techniques will not suffice*. Further on he concludes also that usual techniques "offer little probability of success." After further recitation regarding his belief in the efficaciousness of regular techniques, Agent O'Brien turns his attention to the multiple informants referred to elsewhere in the affidavit. He states that the informants "have indicated that they are unwilling to testify" (Affidavit, p. 4) against the target defendants.

Reduced to its fundamentals, the affidavit seems to point out that gambling cases are difficult to investigate and that informants or betting customers are reluctant to testify. As to Agent O'Brien's implication of "good faith", it is axiomatic that the good faith of the affiant is of no consequence in these situations.

In *United States v. Kalustian*, 529 F. 2d 585 (9th Cir. 1975), the Ninth Circuit reversed a conviction and ordered suppression of evidence gained from a wiretap in a case similar to the instant case. The Court found, after reviewing the affidavits submitted by the FBI agent in support of the wiretap application, that the affidavit failed to satisfy that requirement of 18 U.S.C. § 2518(1)(c) which provides that such application shall include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The affidavit in *Kalustian* was substantially better in many respects that the affidavits submitted to Judge Van Pelt in the instant case. In *Kalustian*, it did include the fact that the informants would refuse to testify even if granted immunity, while here the affidavit merely points out that the witnesses were unwilling to testify.

Otherwise the affidavits in *Kalustian* and here consist primarily of conclusions. There are assertions that gambling cases are

difficult cases and that ordinary or usual investigative techniques are more difficult to employ in gambling cases.

Kalustian takes the position (with which we concur) that the use of wiretapping as an investigative tool is an extra-ordinary step in the investigative procedure and should only be undertaken when all else fails or would be futile. In the instant case it was demonstrated to the Court that in three separate counts of the indictment the usual investigative procedures were not only followed but indeed were highly successful in bringing the case to trial and ultimately in gaining the conviction.

If the rationale of *Kalustian* is not followed, then it seems inevitable that ultimately the use of wiretapping will be routinely employed as the initial step in all criminal investigations, especially where they involve gambling violations. This is precisely the evil that *United States v. Giordano*, 416 U.S. 505 (1974), warned against.

The Tenth Circuit in its opinion herein attempted to distinguish *Kalustian*, but we respectfully submit that the Court ruled erroneously in its comparison of the case at hand with that of *Kalustian*. The effect of the opinion herein is to suggest that using the actual participants in a gambling operation who have divulged information to the FBI with regard to the operation is not a legitimate investigative technique, as opposed to the extraordinary step of wiretapping. Petitioners' position is that in the affidavit Agent O'Brien merely indicated that those people with whom he had talked and who had personal knowledge with regard to the gambling operation had discussed an unwillingness to testify. It might be submitted that any witness with regard to an illegal activity might assert that same unwillingness if called upon to undergo the burdens of testifying, either before a grand jury or in the case in chief.

Contrary to what the Tenth Circuit's position seems to be from its opinion, the seeking out and subsequent use of wit-

nesses to a crime is indeed an investigative technique which should be employed before the drastic step of wiretapping is employed. The mere conclusion on the part of the affiant in the application for a wiretap that these witnesses to the crimes alleged would be unwilling to testify does not meet the requirement that other investigative techniques or procedures should be tried and/or shown to be subject to failure or to be too dangerous.

It would appear from Agent O'Brien's affidavit that he possessed two alternatives in the final chain of investigation: he could either name and utilize the testimony of actual participants in the crime who had informed him of the existence of the illegal conduct, or he could undertake the extraordinary step of wiretapping. The Tenth Circuit has accepted as fact Agent O'Brien's conclusion that these participants in the crime would not testify if called before a grand jury or called upon to testify. This, we assert, was an unwarranted conclusion, and in effect it substitutes the affiant's conclusions with regard to the need for a wiretap for the considered judgment of the judiciary.

The decision in this case places the Tenth Circuit in opposition to the Ninth Circuit's holding in *Kalustian* and seriously undermines this Court's holding in *United States v. Giordano*. The doctrine of *Kalustian* is a frequently recurring issue in wiretap cases, and we believe it is important that this Court establish guidelines. Wiretapping has not abated in recent years, nor have the cases presenting wiretap issues. This case presents an opportunity for clarification of these issues.

Because of the violations of the wiretap statutes and the conflicts between the opinion of the Tenth Circuit herein and those of this Court and the Ninth Circuit, we respectfully suggest that certiorari should be granted as to this Question.

III

Prior Acts

Count III of the indictment charged an offense commencing on August 1, 1972, and continuing through January 31, 1973. (Count II covered the dates August 1, 1973 to January 31, 1974, and Count I covered August 1, 1974 to May 1, 1975.) Despite the fact that the indictment was limited as to the period of time, the District Court frequently permitted the prosecutor over objection of petitioners to produce evidence of conduct and activities which occurred long prior to August 1, 1972.

As an example, Mr. Wilscam was permitted to testify that he first met petitioner Villano in 1969 and began wagering with him until 1970 (Tr. 263-269). Mr. Shaner testified about gambling with Mr. Villano for "quite a number of years" prior to 1972 (Tr. 324-325). Mr. Zoller was also questioned about dealings with Mr. Villano in 1969 and 1970, and at that point the Court permitted the record to reflect the continuing objection by defendants as to all similar future witnesses (Tr. 377-380). The Court did give a limiting instruction that the evidence was admitted to show "a plan, scheme, or common operation" (Tr. 378-379); the instruction, however, did not relate to the purpose for which such evidence was being admitted, but was only in the nature of a general conspiracy instruction pertaining to the admissibility of conspiracy evidence.[5]

The Tenth Circuit opinion, in its one-paragraph discussion of this issue, relied upon *United States v. Beathune*, 529 F. 2d

[5] The District Court seems to have confused the purpose for which the evidence was admitted with the general rules of conspiracy law. And the Court disregarded the fact that there was no conspiracy count in the indictment. Compare Tr. 1718.

696 (10th Cir. 1975), and *United States v. Smaldone*, 485 F. 2d 1333 (10th Cir. 1973), but we submit that the citation of these cases demonstrates that the Court has misconstrued the applicable law. *Beathune* involved precisely the same offense that was on trial, the sale of a particular brand of stolen automobile, and the earlier *Smaldone* case involved evidence of a continuation of the same gambling enterprise on trial. In the instant case, the evidence did not relate to the same method of business operation, nor did it involve the same gambling enterprise. The evidence may have tended to show gambling by petitioner Villano, but it was not the specific type of gambling operation which he was charged to have engaged in in violation of the federal law. Evidence that he may have had sporadic or even continuous gambling with individual bettors prior to the dates in the indictment would not show that he was a federal felon involved in a business activity in violation of 18 U.S.C. § 1955. Thus the cases of *Mills v. United States*, 367 F. 2d 366 (10th Cir. 1966), and *Melton v. United States*, 398 F. 2d 321 (10th Cir. 1968), are more applicable to this case, and they direct that such evidence of prior acts should not have been received. See also *Mares v. United States*, 383 F. 2d 805, 811 (10th Cir. 1967).

The Tenth Circuit also relied upon Rule 404(b) of the Federal Rules of Evidence. We believe the Rule is not applicable here. Had there been other evidence of gambling businesses with five or more participants, such evidence might possibly have been permissible. But here the evidence merely tended to show that bettors had engaged in gambling activities with petitioner Villano. At the most, this could have shown a violation of Colorado law, but it was certainly not a prior scheme or pattern in violation of § 1955.

The Court's interpretation of Rule 404(b) is much broader than the purpose for which it was adopted. We believe it would be appropriate for this Court to clarify the applicability of Rule 404(b), as the offering of evidence of prior acts of misconduct

is rapidly becoming one of the most troublesome areas of the law of evidence.

Weinstein, in his treatise on the Federal Rules of Evidence, recognizes a conflict in opinions (para. 404[08], page 404-40):

> ". . . the question of when evidence of a particular criminal act may be admitted is so perplexing that the cases sometimes seem as numerous 'as the sands of the sea,' and often cannot be reconciled."

Further, at para. 404[09], page 404-57, there is a discussion of the plan or design theory of admissibility:

> "Most troublesome are cases which admit proof of other crimes as evidencing a plan or design from which it can be inferred that defendant committed the crime in question. Courts use the plan or design label in a variety of somewhat overlapping situations."

The conflict among the authorities over the admissibility of evidence of other activities and crimes has not been resolved by Rule 404(b). It would be appropriate for this Court now to delineate guidelines for the application of the new Rule, thereby avoiding many trial problems and potential appeals.

Because of the importance of a resolution of this issue to the administration of criminal justice, and to avoid conflicts among lower courts and obviate numerous appeals, we respectfully suggest that certiorari should be granted as to this Question.

IV

Leading Questions on Redirect Examination

Rule 611(c) of the Federal Rules of Evidence provides:

> "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. . . ."

Early in the trial, the prosecutors began to ask leading questions on redirect examination of government witnesses, and the District Court, apparently in reliance on Rule 611(c), overruled the objection (Tr. 251). The issue came up again during redirect examination of a crucial government witness, David Waters, and defense counsel was again overruled (Tr. 566), the Court stating: "This is redirect." Specific reference was made to Rule 611(c) during later redirect examination of the same witness, and the District Court reiterated its position that leading questions are permissible on redirect examination (Tr. 581-582).

Thereafter, the prosecution continued to utilize the technique of leading and suggestive questions (in effect, testimony by government counsel) and this persisted throughout the remainder of the trial. The abuse was so patently obvious that one witness, an attorney, answered a lengthy question on redirect examination (Tr. 1463): "What I'm saying is that my concern is over continued leading questions without objection."

The District Court's interpretation of Rule 611(c) was erroneous, and the prosecution should not have been permitted to ask leading questions on redirect examination. If, as the District Court believed, leading questions may be asked on redirect examination even though not on direct, then a prosecutor need only touch briefly upon the subject on direct examination and then present his own "testimony" by his leading and suggestive questions on redirect examination. Certainly Rule 611(c) was not intended for that purpose.

The notes of the Advisory Committee on the proposed Rules of Evidence are significant, for in the discussion of Subdivision (c), it was said:

> "The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of

> right. The purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (*savoring more of a re-direct*) or of an insured defendant who proves to be friendly to the plaintiff." [Emphasis supplied.]

The Advisory Committee, in suggesting that there are certain occasions where leading questions may not be asked on cross-examination, thus indicated that leading questions are not permitted on redirect examination.

The Tenth Circuit rejected petitioners' argument as to the impropriety of the leading questions by stating without reasons and in one sentence that "there was no clear abuse of discretion." Assuming arguendo that permission to ask leading questions on redirect examination is a matter of discretion, there could be no clearer abuse of discretion than in the instant case. This was not a case of one or two reluctant or hostile witnesses, but instead involved many government witnesses, including a telephone company record custodian (Tr. 251) and a law enforcement officer (Tr. 855).

Furthermore, the trial Court did not grant such permission as an exercise of discretion. Instead, the District Judge acted pursuant to his erroneous interpretation of Rule 611(c) of the Federal Rules of Evidence. He adopted a rule of law, not an act of discretion, that leading questions are proper on redirect examination pursuant to Rule 611(c).

This trial did not present an occasional instance where a leading question was permitted on redirect examination. The entire redirect examination of most witnesses showed a consistent and deliberate use of the Court's erroneous construction of Rule 611(c). Without redirect examination by leading questions and without such "testimony" by the prosecutor, the picture of this case presented to the jury would have been entirely different.

The Trial Court's application of Rule 611(c) was erroneous, and the error was certainly prejudicial to petitioners. If this recently adopted Rule of Evidence is to be construed as in this case, we believe it is contrary to the intent of the drafters of the Rule and will have a drastic and undesirable effect upon the traditional rules of presentation of evidence.

Because of this erroneous impact upon the method of fact-finding, we respectfully suggest that certiorari should be granted as to this Question.

V

Disclosure of informants

On September 11, 1975, a hearing was held before the United States District Court on the motion of defendants Reeb, Owens, Whalen, Gardner, Smaldone and Villano for disclosure of informants. In support of said motion, counsel for petitioners elicited testimony from FBI Special Agent William J. Malone. The testimony of Mr. Malone appears at Supplemental Vol. V of the transcript, beginning at page 8.

The information elicited from Agent Malone at that hearing was that he had received information from a variety of sources that could be characterized as informants or informers, and further, that these informants were involved in transactions with the defendants which was the subject matter of the Indictment. However, it was never made clear whether or not these people were participants in a business sense or participants merely as mere bettors.

It is the position of petitioners that a sufficient foundation was laid for a showing that the information possessed by informants, who were also earwitnesses and eyewitnesses to the alleged crime, would be relevant and helpful to the defense. The Court reserved ruling on the motion pending an *in camera* examination of the material in the possession of the government. After an examination of that material, the Motion for Disclosure was denied.

The charges against petitioners are such that a defense which does not absolutely require the taking of the stand by the defendants themselves is at best difficult, and is made all the more difficult if witnesses who have actually participated in the alleged bookmaking activity, either as bettors or one of the other enumerated categories of financing, managing, owning, operating or conducting, are withheld from defendants in the preparation of their case.

The case at hand seems to be precisely the kind of situation contemplated in *Roviaro v. United States*, 353 U.S. 53 (1957), where the Court pointed out: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 1 L.Ed. 2d at 645.

It becomes even more difficult when the decision-making process as to whether or not the witness is in fact useful to the defendant or should be called by the defendant is made by the government or by the Court. "The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide." (Ibid, page 647).

In the present case, the District Court, after reserving ruling on the Motion for Disclosure of Informants, conducted an *in camera* examination into the material concerning the al-

leged informants and the information which was possessed by them in their role in the case at hand, and upon so doing, ruled that, in his opinion, said informants should not be disclosed. We respectfully disagree with the position of the District Court in that petitioners made sufficient showing at the hearing on September 11, 1975, to place themselves within the ambit of the rules contemplated in *Roviaro v. United States, supra*, and *United States v. Martinez*, 487 F. 2d 973 (10th Cir. 1973).

As was indicated at the hearing on September 11, there are three aspects to the *Martinez* case which must be met in order for the moving party to require disclosure of the informant. One is that the alleged informant is an eye- or an ear-witness to the transactions which claim to have been violations of the law; secondly, that the information possessed by the informant may be relevant; and thirdly, that once these two propositions have been established, there must be an additional showing that on balance the interests of justice would best be served by disclosure.

It was the District Court's view that there was a fourth aspect in the *Martinez* case which required a showing that there would be testimony by a defendant or some other party that the defendant was in fact innocent of the alleged criminal misbehavior. We disagree with that position and instead feel that this is not an essential ingredient in the test for disclosure of the informant. Indeed, the mere entry of a not guilty plea should satisfy any requirement of a defendant's denial of being involved in the alleged crime.

Counsel is unaware of the material which was submitted to the Court for its *in camera* inspection. However, presumably it is sealed and is part of the record available in this case. We would respectfully ask this Court to review that material in light of the hearing on petitioners' motion for disclosure of informants and to agree that the request for disclosure was a proper one under the cases cited; it was error to refuse such disclosure.

The Tenth Circuit in its opinion herein merely affirmed the District Court without any apparent independent examination of the *in camera* documents. There is nothing in the record herein which reveals those factors which were weighed against petitioners' right to have the opportunity to examine witnesses who were admittedly participants in the gambling operation. It would seem the more appropriate rule is that, once there has been a showing that the informants are indeed potential witnesses to the events alleged, there should be a presumption in favor of their disclosure, unless there is a clear showing by the government that disclosure would not be in the interests of justice. Petitioners met their burden of showing that the informants were potential eye- or ear-witnesses to the transactions complained of; however, there was no indication by the government (unless it was conducted *in camera* outside the presence of counsel for petitioners) that the disclosure of the informants would not serve the interests of justice.

The Tenth Circuit seems to base its ruling upon the fact that the trial judge, after an *in camera* examination of the confidential material, came to the conclusion that none of the informants would have any testimony which would be helpful to petitioners in the trial on the merits. We believe that the Fifth and Sixth Amendments and *Roviaro* require that the determination of whether or not information would be helpful to the defense should best be left to defense counsel and may be denied only after a clear showing by the prosecution that disclosure would on balance be detrimental to the interests of justice.

Because of the conflict between the opinion of the Tenth Circuit and that of this Court in *Roviaro v. United States*, we respectfully suggest that certiorari should be granted as to this Question.

VI

Address of Witness

FBI Agent William Malone was case agent and testified for the prosecution on some crucial issues. During cross-examination, the following exchange took place (Tr. 802-803):

"By Mr. Davies:

Q. Agent Malone, maybe it's the fact that it's Thursday and late in the afternoon, but I seem to be not getting everything as I used to. The other witnesses have been called by the governent. I've heard them. I was able to hear their address and I didn't hear yours. Would you tell me your home address, please?

The Court: I don't think that's necessary.

The Witness: I haven't given it.

The Court: I don't think that's material. He'll give his office address. I don't believe his home address is material and if you're going to cite *Alford v. the United States*, it's not applicable.

Mr. Davies: All right, Your Honor, I was going to cite *Smith v. Illinois*.

The Court: I'm not going to order——

Mr. Davies: I know that.

The Court: All right.

Mr. Davies: I think it's a relevant question under that case, is the only thing.

The Court: Mr. Davies, I am not going to order any agent of the Federal Bureau of Investigation to give his home address.

Mr. Davies: All right.

The Court: He will give his office address.

Mr. Davies: All right."

This Court in *Smith v. Illinois*, 390 U.S. 129 (1968), made it clear that the question of a witness' residence is a legitimate one and that there is no need for the proponent of the question to demonstrate either need or relevancy as a foundation for the question. The Court further pointed out that avoiding an answer to the question may be possible if the witness is invoking a privilege against self-incrimination or for some other valid reason. The dissent in *Smith* added to the permissible reasons for failing to answer to the question the possibility that the answer might place the witness' safety or life in jeopardy. However, even under the dissenting viewpoint, the burden would be upon the witness or his attorney to come forward with a showing that the witness has some legitimate reason for not answering the question, and once that burden has been fulfilled, the burden would then shift to the questioner to show that the interest of the defendant in asking the question outweighed the interest of the witness in not answering.

In the present case, the District Court apparently employed a rule that any agent of the Federal Bureau of Investigation is immune from disclosing to the jury his residence. Indeed, there was no objection on the part of the government to the question and there was no showing by the witness that answering the question would in any way place his safety in jeopardy. Nor was there any showing that he legitimately refused to answer that question or any of the other grounds explicitly or implicitly set forth in *Smith* for refusal to answer the question.

While *Smith* has been the subject of interpretation by a variety of courts where the issues of privilege, safety, or harassment have played a role, its primary holding has not been disturbed. See *United States v. Dickens*, 417 F. 2d 958 (8th Cir. 1969), *United States v. Palermo*, 410 F. 2d 468 (7th Cir. 1969),

United States v. Varelli, 407 F. 2d 735 (7th Cir. 1969), and *United States v. Lyon*, 397 F. 2d 505 (7th Cir. 1968).

The Tenth Circuit has failed to apply *Smith v. Illinois* to the facts of this case. The Court's statement that "the agent's address would not have touched on his credibility" is a conclusion which should have been for the jury to determine, unless the government proved the existence of any of the exceptions to the rule of disclosure.

Because of the refusal of the Tenth Circuit to follow *Smith v. Illinois*, we respectfully suggest that certiorari should be granted as to this Question.

VII

Fifth Amendment privilege

A number of witnesses called to testify for the prosecution invoked their Fifth Amendment privilege against self-incrimination. The prosecutor knew in advance that the witnesses would do so, because he was always ready with the requisite documents to make application for grants of immunity under the provisions of 18 U.S.C. § 6001 et seq.

The first witness of this nature was Jerry Woodward. He was called to the witness stand in front of the jury and was immediately asked if in 1972 he placed any wagers on sporting events. He refused to answer on the grounds that his answer might tend to incriminate him (Tr. 280). A brief colloquy followed: when it was obvious that the prosecutor was asking for immunity, the Court at that point excused the jury, explaining that "we have to go through this rigamarole" (Tr. 281). Actually the prosecutor stated prior to the withdrawal of the jury "that there is a possibility that the witness has a right to make that response" (Tr. 281). Thus, the prosecutor not only knew in ad-

vance that the witness would invoke his Fifth Amendment protection, but he was also aware that the witness had a right to do so. (Note also that the authorization from the Attorney General for the application for grant of immunity was dated on the day before the witness Woodward testified (Tr. 283)—further proof that the staging of this incident in front of the jury was deliberate.) Under these circumstances, the prosecutor should have presented this matter outside the presence of the jury, similar to the way in which it was handled with the witness Waters (Tr. 421).

At the time of this incident with the witness Woodward, the trial Court's attention was directed to *DeGesauldo v. Colorado*, 364 P. 2d 374, 86 A.L.R. 2d 1435 (Colo. Sup. en banc 1961), where a conviction was reversed for precisely the same prosecutorial activities. The Court said (l.c. 376):

> "Thus the question is whether the district attorney can call as a witness an accomplice or co-conspirator . . . so as to get before the jury the fact that he, at least considers that his testimony would be incriminating to him, the accomplice. The effect of such a device is clear. The jury is told of the whereabouts of the missing defendant and is also told that he at least considers it impossible to testify without incriminating himself. Does such a scene create prejudice in the minds of the jury?"

The Supreme Court of Colorado declared that, with the prosecutor being aware that the witness would invoke his privilege, "the inference is that this was a studied attempt to bring to the attention of the jury his refusal to testify and his claim of the 'Fifth Amendment'." The Court suggested that it might overlook the conduct of the prosecutor if he acted in good faith or if the Court instructed the jury to disregard the incident. (In the instant case, the prosecutor's preparation for the grant of immunity demonstrates that he was not acting in good faith and was not surprised when the witness invoked his constitutional privilege;

in addition, the District Court did not caution the jury.) After a review of numerous cases, the Colorado Supreme Court concluded that the prosecutor's action was reversible error.

The District Court herein refused to follow the *DeGesauldo* case, stating: "I don't think it's good federal law" (Tr. 282). We believe the District Court was in error, for as said in an analogous situation in *Melton v. United States*, 398 F. 2d 321, 322 (10th Cir. 1968):

> "The prosecution should not call a witness in the presence of the jury when it knows, and concedes, that the witness will invoke a valid marital privilege."

Reversal was also required for similar reasons in *United States v. Coppola*, 479 F. 2d 1153 (10th Cir. 1973). Representative cases from other circuits, with which the instant opinion is in conflict, are *Robbins v. Small*, 371 F.2d 793 (1st Cir. 1967), cert. den. 386 U.S. 1033 (1967), *United States v. Maloney*, 262 F. 2d 535 (2nd Cir. 1959); *San Fratello v. United States*, 340 F. 2d 560 (5th Cir. 1965), *United States v. King*, 461 F. 2d 53 (8th Cir. 1972), *Sanders v. United States*, 373 F. 2d 735 (9th Cir. 1967), and *Fletcher v. United States*, 332 F. 2d 724 (D.C. Cir. 1964). See Annotation, "Prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense with which accused is charged." 86 A.L.R. 2d 1443.

The prosecutor here was well aware that the witness Woodward would invoke his Fifth Amendment privilege; to do so in front of the jury created a prejudicial atmosphere for petitioners. This is especially so in view of the prosecutor's later argument (Tr. 1588) that Woodward was a culprit who should be counted in determining whether there were five or more participants in the gambling operation. (See Question I of this petition relating to who may be counted.) Certainly when the jury heard that

he refused to testify because he felt that he had violated the law, the jury would draw no other inference than that he had violated the law and therefore, by his own lips, he was to be included in the group of five or more.

The last paragraph of the opinion herein cites *Namet v. United States*, 373 U.S. 179 (1963), and *United States v. Martin*, 526 F. 2d 485 (10th Cir. 1975), as contemplating "a situation where one is trying to raise inferences of guilt by having the witness assert his privilege." We suggest that this is precisely what government counsel was attempting to do. They were not surprised when Woodward invoked his privilege, for they knew it in advance and were armed with immunity documents. We suggest that the witness' refusal to testify before the jury was a deliberate programmed maneuver by the prosecutors. That the same prosecutors engaged in the same conduct two weeks later in the District Court in Nebraska, see *United States v. Quinn*, 543 F. 2d 640 (8th Cir. 1976). Compare ABA Project on Standards Relating to the Prosecution Function, § 5.7(c):

> "It is unprofessional conduct for a prosecutor to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege."

Because of the conflict of the Court of Appeals with the doctrine and guidelines established by this Court in *Namet v. United States* and because of the conflict with other well-reasoned decisions of numerous other circuits and because of the prosecutorial misconduct herein, we respectfully suggest that certiorari should be granted as to this Question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD E. DAVIES
DAVIES and SAINT-VELTRI
1034 Logan Street
Denver, Colorado 80203
Attorneys for Petitioners Reeb, Whalen and Gardner

and

IRL B. BARIS
721 Olive Street
St. Louis, Missouri 63101
Attorney for Petitioners Smaldone and Villano

APPENDIX

APPENDIX A

Opinion of Court of Appeals, Dated April 7, 1977
Not for Routine Publication

United States Court of Appeals
Tenth Circuit

Nos. 76-1178—76-1182, incl.

United States of America, Appellee, v. Clarence M. Smaldone, Carol Jean Reeb, Paul Clyde Villano, Alice Whalen and Carol Joyce Gardner, Appellants.	Appeal From the United States District Court for the District of Colorado (D.C. No. 75-CR-137)

Irl B. Baris, St. Louis, Missouri, and Leonard E. Davies, of Davies and Saint-Veltri, Denver, Colorado, for Appellants.

William E. Zleit, Special Attorney, Department of Justice, (James L. Treece, United States Attorney, and Gary Cornwell, Special Attorney, Department of Justice, with him on the Brief), for Appellee.

Before Lewis, Chief Judge, Breitenstein and Seth, Circuit Judges.

Seth, Circuit Judge.

The defendants appeal their convictions on a three-count indictment for violations of 18 U.S.C. §§ 1955 and 2. Each count was based on the operation of a bookmaking business

during one of the fall football seasons from 1972 to 1974. Clarence M. Smaldone and Paul Clyde Villano were convicted of the charges in Count II. Alice Whalen was convicted on Count I. Joyce Gardner was convicted of the charges in Counts II and III. Carol Jean Reeb was convicted on all three counts.

On a joint appeal the defendants allege that the evidence was insufficient to sustain a conviction under 18 U.S.C. § 1955 because "five or more persons" were not involved in the gambling business. The defendants do not question the correctness of the jury instructions which included those who conducted, financed, managed, supervised, directed, or owned the gambling business. United States v. Schaefer, 510 F.2d 1307 (8th Cir.); United States v. Smaldone, 485 F.2d 1333 (10th Cir.); United States v. Meese, 479 F.2d 41 (8th Cir.); United States v. Hunter, 478 F.2d 1019 (7th Cir.).

In Count I the defendants challenge the inclusion, in the count of "five or more persons," of George Iantorno, who they assert was an independent contractor running his own gambling business, or a mere bettor who laid off some of his own bets and paid the vigorish on the layoffs. The same is argued as to Ellis Smith in Count II. However, the evidence shows that Iantorno and Smith were properly included under the instructions as "an independent contractor," or "layoff man." United States v. Bohn, 508 F.2d 1145 (8th Cir.); United States v. McHale, 495 F.2d 15 (7th Cir.). In Count III the defendants claim that Woodard and Shaner were "mere bettors." Shaner and Woodard testified that they did not consider themselves bookmakers. But in their brief the defendants claimed that "they were nothing more than conduits for the placing of bets." The evidence established that Woodard turned in wagers for others in the amount of several thousands of dollars. Shaner would give Woodard the line and accept Woodard's wagers. Shaner also collected gambling debts from Woodard and others. Shaner

testified that he took some bets and then bet them off. Woodard and Shaner were not mere bettors and the evidence supported more than just a single act of placing a bet for another. United States v. Bohn, 508 F.2d 1145 (8th Cir.). The evidence is sufficient to support their inclusion. Even without Shaner and Woodard there is sufficient evidence to establish a participation by five others in Count III.

Also in Count III the defendants attack the inclusion of Smaldone and Villano because Smaldone succeeded in the business after Villano went to jail. They urge that Smaldone, Villano, Gardner, Whalen, and Reeb were not together in an operation for a period in excess of thirty days which is an element of 18 U.S.C. § 1955(b)(1)(iii). United States v. Bridges, 493 F.2d 918 (5th Cir.). However, this Circuit has held that this thirty-day requirement refers to the gambling operation itself and not to the individuals conducting it. United States v. Smaldone, 485 F.2d 1333 (10th Cir.). This was properly included in the instructions to the jury.

The defendants rely on United States v. Box, 530 F.2d 1258 (5th Cir.), to urge that Woodard and Shaner were mere bettors. Box's conviction was reversed because he did not accept layoff bets regularly, hold himself out to take layoff bets or as a bookmaker, or provide line or other gambling information to bookmakers. Box was found to be a heavy bettor who received favorable treatment from bookmakers and not an employee of bookmakers. However, there is evidence to support a finding that Woodard and Shaner were employees of the gambling operation.

The defendants also urge that under United States v. Leon, 534 F.2d 667 (6th Cir.), the inclusion of Salanitro, Cappellano, Iantorno, Smith, and McCandless in Counts I and II was error. The conviction of Bourgeois, a bookmaker in the cited case, was reversed even though he accepted layoff bets and exchanged

line information. But it was reversed because there was insufficient evidence to establish that "Leon was making 'layoff bets' with Bourgeois." The facts here establish that these men were disseminating line information and transacting layoff bets within this gambling operation.

The record clearly establishes that the five or more persons requirement was met.

The defendants also urge that wiretapping of telephone conversations between defendant Reeb and Salanitro should be suppressed because information used to prosecute Reeb related to another offense, the Government did not furnish Reeb with an inventory of the intercepted communications, and because the affidavit to support the application for wiretap was insufficient.

Defendant Reeb was not known at the time of the original application for the wiretap in November 1973. Under United States v. Donovan, — U.S. —, 45 U.S.L.W. 4115, the Court held that the Government must provide the issuing judge a description of the general class or classes of unnamed but intercepted individuals in order that the judge can exercise his discretion under section 2518(8)(d) to provide inventory notice to them. However, failure to do this does not result in the suppression of the intercepted conversations as to this unnamed individual if all other statutory requirements are met. Although *Donovan* speaks in terms of "identifiable persons," the issue of whether or not Reeb was known is immaterial because the lack of inventory notice does not suppress her intercepted conversations. Although no inventory notice was given in *Donovan* and our case, they were provided with the intercept order, application, and related papers which would insure evidentiary compliance with section 2518(9).

In their brief the defendants contend that 18 U.S.C. § 2517(5) contemplates a different factual offense as well as a different

offense, requiring a separate wiretap application for its use. This has no merit because the statute ("relating to offenses other than those specified") and case law support only a different offense. United States v. Cox, 449 F.2d 679 (10th Cir.); United States v. Brodson, 393 F.Supp. 621 (E.D. Wis.). The statute is designed to prevent fishing expeditions.

The third point raised by the defendants for suppression is that the affidavit to support the application for the wiretap was insufficient, citing United States v. Kalustian, 529 F.2d 585 (9th Cir.). The basis of this argument is that Agent O'Brien's affidavit is conclusionary and does not present facts from which the court can find that "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). But in *Kalustian* the facts of the affidavit to support probable cause to infer the existence of a gambling conspiracy nearly all "trickled into the ears of FBI agents through the efforts of a series of professional gamblers and bookmakers" who were unwilling to testify. Our affidavit not only enlisted the information of informants but gave a detailed report of the physical surveillances of the suspects' movements from August to November 1973 establishing a pattern of a possible gambling operation along with surveillances at race tracks. Subpoenaed telephone records established a link between the suspected locations and the race tracks. Police records established the existence of previous gambling activities by these individuals. For seven months the standard investigations which provided probable cause failed to produce evidence to sustain a prosecution and based on the agent's personal experience with this case along with his "knowledge and experience" in other gambling investigations, he concluded that present "techniques would succeed to a limited degree in establishing the scope and nature of illegal gambling operations." This affidavit "enlightened" the court as to why electronic surveillance was necessary whereas in *Kalustian* alternative methods of in-

vestigation were not used on the basis of "knowledge and experience." The Government is not required to try every conceivable method before applying for a wiretap order. Here they had failed in the past with little chance for success in the future. The agent's personal experience with this investigation coupled with his "knowledge and experience" was sufficient for the affidavit. United States v. Matya, 541 F.2d 741 (8th Cir.); United States v. McHale, 495 F.2d 15 (7th Cir.).

There was no error in admitting evidence of prior acts of preindictment gambling activities to establish a course of conduct or scheme under Rule 404(b), Federal Rules of Evidence The trial judge properly admonished the jury that this evidence was limited to show a pattern or scheme and had nothing to do with the charges. United States v. Beathune, 527 F.2d 696 (10th Cir.); United States v. Smaldone, 485 F.2d 1333 (10th Cir.). The cases the defendants cite to show error speak of unrelated offenses or of offenses the defendant is not being charged with and are not applicable. Melton v. United States, 398 F.2d 321 (10th Cir.); Mills v. United States, 367 F.2d 366 (10th Cir.).

Under Rule 611, Federal Rules of Evidence, there was no clear abuse of discretion in allowing the prosecution to ask leading questions in the redirect examination of Government witnesses. Comins v. Scrivener, 214 F.2d 810 (10th Cir.).

The defendants assert that it was error for the trial judge to refuse to disclose the identities of the Government informants. The trial Court denied disclosure after reviewing the confidential material *in camera* and hearing the testimony of FBI Agent Malone because there was not the "slightest suggestion" that "any confidential informer could have any testimony which would be helpful to the defendants in the trial on the merits." The balance fell in favor of nondisclosure. Roviaro v. United States, 353 U.S. 53; United States v. Martinez, 487 F.2d 973 (10th Cir.).

There is no merit to the contention that failure of FBI Agent Malone to give his residence address was error under Smith v. Illinois, 390 U.S. 129. The defendants were not denied their Sixth Amendment right to confrontation of effectively cross-examining Malone. The agent's address would not have touched on his credibility.

Lastly, the defendants urge that witness Jerry Woodard's invocation of his Fifth Amendment privilege against self-incrimination in the presence of the jury constitutes reversible error. There was no prejudicial buildup of inferences against the defendants by Woodard invoking his Fifth Amendment privilege and he was subject to cross-examination after he was immunized. Namet v. United States, 373 U.S. 179. Under United States v. Martin, 526 F.2d 485 (10th Cir.), it is within the trial judge's discretion as to whether or not to allow a witness to invoke his Fifth Amendment privilege before a jury. But both *Namet* and *Martin* contemplate a situation where one is trying to raise inferences of guilt by having the witness assert his privilege. This was not the case here because Woodard was granted immunity to testify.

We find no error, and the case is Affirmed.

APPENDIX B

Judgment of Court of Appeals, Dated April 7, 1977, Re: Smaldone

United States Court of Appeals
For the Tenth Circuit

March Term—April 7, 1977

Before The Honorable David T. Lewis, Chief Judge

The Honorable Jean S. Breitenstein, Senior Judge

The Honorable Oliver Seth, Circuit Judge

United States of America,
Plaintiff-Appellee.
vs.
Clarence M. Smaldone,
Defendant-Appellant.

No. 76-1178
(D.C. No. 75-CR-137)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Clarence M. Smaldone, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

HOWARD K. PHILLIPS
Clerk
s By ROBERT L. HOECKER
Chief Deputy Clerk

J-2 5 76

APPENDIX C

Judgment of Court of Appeals, Dated April 7, 1977, Re: Reeb

United States Court of Appeals
For the Tenth Circuit

Before The Honorable David T. Lewis, Chief Judge

The Honorable Jean S. Breitenstein, Senior Judge

The Honorable Oliver Seth, Circuit Judge

United States of Amercia, Plaintiff-Appellee, vs. Carol Jean Reeb, Defendant-Appellant.	No. 76-1179 (D.C. No. 75-CR-137)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Carol Jean Reeb, appellant, shall, within ten (10) days from after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

HOWARD K. PHILLIPS
Clerk
By /s/ ROBERT L. HOECKER
Chief Deputy Clerk

J-2 5/76

APPENDIX D

Judgment of Court of Appeals, Dated April 7, 1977,
Re: Villano

United States Court of Appeals
for the Tenth Circuit

March Term—April 7, 1977

Before The Honorable David T. Lewis, Chief Judge

The Honorable Jean S. Breitenstein, Senior Judge

The Honorable Oliver Seth, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Paul Clyde Villano, Defendant-Appellant.	}	No. 76-1180 (D.C. No. 75-CR-137)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Paul Clyde Villano, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

HOWARD K. PHILLIPS
Clerk
/s/ By ROBERT L. HOECKER
Chief Deputy Clerk

J-2 5/76

APPENDIX E

Judgment of Court of Appeals, Dated April 7, 1977,
Re: Whalen

United States Court of Appeals
for the Tenth Circuit

March Term—April 7, 1977

Before The Honorable David T. Lewis, Chief Judge

Honorable Jean S. Breitenstein, Senior Judge

Honorable Oliver Seth, Circuit Judge

United States of America,
Plaintiff-Appellee.
vs.
Alice Whalen,
Defendant-Appellant.

No. 76-1181
D.C. No.
75-CR-137

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Alice Whalen, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshall for the District of Colorado in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

HOWARD K. PHILLIPS
Clerk
/s By ROBERT L. HOECKER
Chief Deputy Clerk

J-2 5/76

APPENDIX F

Judgment of Court of Appeals Dated April 7, 1977, Re: Gardner

United States Court of Appeals
For the Tenth Circuit

March Term—April 7, 1977

Before The Honorable David T. Lewis, Chief Judge

The Honorable Jean S. Breitenstein, Senior Judge

The Honorable Oliver Seth, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Carol Joyce Gardner, Defendant-Appellant.	No. 76-1182. (D.C. No. 75-CR-137)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Carol Joyce Gardner, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

HOWARD K. PHILLIPS
Clerk

/s/ By ROBERT L. HOECKER
Chief Deputy Clerk

J-2 5/76

APPENDIX G

Order of Court of Appeals, Dated June 3, 1977, Denying Rehearing

May Term—June 3, 1977

Before The Honorable David T. Lewis, Chief Judge
The Honorable Jean S. Breitenstein, Senior Judge
The Honorable Oliver Seth, Circuit Judge
The Honorable William J. Holloway, Jr., Circuit Judge
The Honorable Robert H. McWilliams, Circuit Judge
The Honorable James E. Barrett, Circuit Judge and
The Honorable William E. Doyle, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Clarence M. Smaldone, Carol Jean Reeb, Paul Clyde Villano, Alice Whalen, Carol Joyce Gardner, Defendants-Appellants.	No. 76-1178, No. 76-1179, No. 76-1180, No. 76-1181, No. 76-1182.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Lewis and Circuit Judges Breitenstein and Seth to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS
Clerk

Supreme Court, U. S.
FILED
SEP 21 1977
MICHAEL RODAK, JR., CLERK

No. 77-17

In the Supreme Court of the United States

OCTOBER TERM, 1977

CLARENCE M. SMALDONE, *et al.*, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	3
Argument	6
Conclusion	22

CITATIONS

Cases:

Alderman v. *United States*, 394 U.S. 165	14
Alford v. *United States*, 282 U.S. 687	19
Henderson v. *Kibbe*, No. 75-1906, decided May 16, 1977	11
McGrath v. *Vinzant*, 528 F.2d 681, certiorari dismissed, 426 U.S. 902	20
Namet v. *United States*, 373 U.S. 179	21
Roviaro v. *United States*, 353 U.S. 53	18
Smith v. *Illinois*, 390 U.S. 129	19, 20
United States v. *Abramson*, 553 F.2d 1164, certiorari denied, June 27, 1977 (No. 76-1672)	17
United States v. *Alvarez*, 469 F.2d 1065	19
United States v. *Armocida*, 515 F.2d 29, certiorari denied *sub nom. Gazal* v. v. *United States*, 423 U.S. 858	14
United States v. *Box*, 530 F.2d 1258	9, 13
United States v. *Brick*, 502 F.2d 219	16
United States v. *Bridges*, 493 F.2d 918	10, 11
United States v. *Brodson*, 528 F.2d 214	15
United States v. *Crockett*, 506 F.2d 759, certiorari denied, 423 U.S. 824	20

Cases—Continued

	Page
United States v. *Donovan*, 429 U.S. 413	15
United States v. *Edwards*, 503 F.2d 838, certiorari denied, 420 U.S. 977	19
United States v. *Kahn*, 415 U.S. 143	16
United States v. *Kalustian*, 529 U.S. 585	17
United States v. *Leon*, 534 F.2d 667	13
United States v. *Marrifield*, 515 F.2d 877	12
United States v. *Mattucci*, 502 U.S. 883	12
United States v. *Pezzino*, 535 F.2d 483	17
United States v. *Poms*, 484 F.2d 919	19
United States v. *Robertson*, 504 F.2d 289, certiorari denied, 421 U.S. 913	16
United States v. *Sklaroff*, 552 F.2d 1156	16, 17
United States v. *Smaldone*, 485 F.2d 1333, certiorari denied, 416 U.S. 936	12
United States v. *Snow*, 521 F.2d 730, certiorari denied, 423 U.S. 1090	18
United States v. *Snyder*, 505 F.2d 595, certiorari denied, 420 U.S. 993	18
United States v. *Tarter*, 522 F.2d 520	12
United States v. *Turner*, 528 F.2d 143, certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996	16
United States v. *Turzitti*, 547 F.2d 1003, certiorari denied, April 18, 1977 (No. 76-1296)	13
United States v. *Vento*, 533 F.2d 838	15

Constitution and statutes:

	Page
United States Constitution, Fifth Amendment	2, 21

Constitution and statutes—Continued

	Page
Omnibus Crime Control and Safe Streets Act of 1968, Title III, as amended, 18 U.S.C. 2510 *et seq.*:	
18 U.S.C. 2510(11)	14
18 U.S.C. 2517(5)	14
18 U.S.C. 2518(1)(c)	15, 17
18 U.S.C. 2518(7)(b)	15
18 U.S.C. 2518(10)	15
18 U.S.C. 2518(10)(a)	14
18 U.S.C. 2	2
18 U.S.C. 1955	2, 3, 6, 11, 12, 14, 17

Miscellaneous:

	Page
Federal Rules of Criminal Procedure, Rule 30	11
Federal Rules of Evidence:	
Rule 404(b)	17
Rule 611	18
H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970)	9
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968)	15

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-17

CLARENCE M. SMALDONE, *et al.*, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1977. A petition for rehearing with a

suggestion of rehearing *en banc* was denied on June 3, 1977. The petition for a writ of certiorari was filed on July 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions directed the jury to include individuals who should not have been included among the "five or more persons" that the government must prove participated in an illegal gambling business under 18 U.S.C. 1955.

2. Whether conversations of petitioner Reeb, intercepted pursuant to court-ordered electronic surveillance, were properly admitted into evidence.

3. Whether evidence of prior criminal activity of petitioner Villano was properly admitted.

4. Whether the district court committed reversible error in allowing the prosecutor to ask leading questions on redirect examination.

5. Whether the district court erred in refusing to order the disclosure of the identities of government informants.

6. Whether the district court properly limited defense counsel's cross-examination of an FBI agent regarding the agent's home address.

7. Whether the prosecutor acted improperly in asking a witness questions that he had reason to believe the witness would refuse to answer on Fifth Amendment grounds, when the prosecutor was prepared to and immediately did offer the witness immunity.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, each petitioner was convicted of one or more counts of a three-count indictment charging the operation of an illegal gambling business, in violation of 18 U.S.C. 1955 and 2.[1] The court of appeals affirmed (Pet. App.).

1. The evidence at trial proved the existence of three distinct bookmaking businesses in the Denver area. The first of these (Count III) began in August 1972 and continued through the 1972 football season. Dave Waters was the "phone man," disseminating line information and accepting wagers over the telephone (Tr. 433). He was hired by petitioner Villano (Tr. 429-434), who had set up the book-

---

[1] Petitioner Smaldone, charged in all three counts, was convicted on Count III and was sentenced to four years' imprisonment and a fine of $15,000. Petitioner Reeb was convicted on all three counts and was sentenced to concurrent four-year prison terms and a fine of $7,500 (on Count III). Petitioner Villano, charged in Counts I and III, was convicted on Count III and was sentenced to four years' imprisonment and a fine of $15,000. Petitioner Whalen was charged in and convicted on Count I and was sentenced to five years' imprisonment (all but six months of which was suspended in favor of probation) and a fine of $3,000. Petitioner Gardner was charged in and convicted on Counts II and III and was sentenced to concurrent five year prison terms (all but six months of which was suspended in favor of probation) and a fine of $3,000 (on Count III).

making business and who accepted wagers and collected money from several bettors in the early fall (Tr. 312, 1269, 1404-1406). Later in the fall Waters was paid by petitioner Smaldone (Tr. 440-442), who also "settled with" several bettors (Tr. 1517).

Petitioner Reeb regularly called bettors concerning their accounts and met with and collected money from bettors (Tr. 388-391, 660, 665, 1153-1164, 1170-1171, 1273, 1279, 1410, 1491). Petitioner Gardner also collected money from bettors (Tr. 1411, 1491). Ray Rodriguez (also known as Tom) was hired by Waters, with petitioner Villano's knowledge, to assist Waters with his duties as the "phone man" (Tr. 459-460).

Jack Shaner regularly transmitted bets to Villano, on his own behalf and on behalf of others (Tr. 322, 326, 335, 450). For these efforts Villano paid him $40 or $50 from time to time (Tr. 323-324). Shaner testified that he took bets from others and was therefore able to protect himself against loss in making bets (Tr. 350). He also testified that "I'd take some bets and then I'd bet them off. I'd shave points, yeah. I'd get a point or two on the game and then try to catch the teams in the middle" (Tr. 354; see also Tr. 358-360, 362).

Jerry Woodward placed bets with Shaner, generally amounting to between $1,000 and $3,000 per weekend, on behalf of himself and from four to seven others (Tr. 286-295). He testified that Shaner would call him and give him "the line" and would regularly drive from Denver to Colorado Springs to settle their accounts (Tr. 289). Woodward relayed "the

line" from Shaner to the other individuals whose bets he placed with Shaner (Tr. 298).

The second bookmaking business (Count II) coincided with the 1973 football season. Kenneth Zeigler was the "phone man" (Gov't Exs. 109, 109A, 110; Tr. 847-850, 1494-1498), and petitioners Reeb and Gardner collected money from and paid money to bettors (Tr. 1167, 1171-1172, 1274-1279, 1414-1423). John Salanitro and Paul Cappelano, Omaha bookmakers, provided Reeb with line information and accepted "lay-off" bets (Gov't Exs. 118, 119; Tr. 950-959, 999-1005).[2] Ellis Smith, another bookmaker, received line information from and made "lay-off" bets with Ziegler, which he "settled with" petitioner Reeb (Tr. 742-744).[3]

The third bookmaking business (Count I) began in August 1974 and continued into the spring of 1975. Larry Lay was the "phone man" (Tr. 145-146, 150, 152, 1032-1033).[4] Lay received line information from petitioner Reeb, who also collected

---

[2] To avoid losing money, bookmakers generally attempt to take an even amount of bets on each side of a contest. They make their money by requiring bettors to put up more money than they stand to win. In this case, for example, petitioners' customers generally had to put up $11 for each $10 they stood to win. A "lay-off" bet is usually a bet between two bookmakers who have too many bets on opposite sides of a contest and who seek to balance their accounts (see Tr. 740).

[3] Smith had at least one "employee," who took bets for him and received a percentage of the profits (Tr. 738).

[4] Lay testified that he accepted approximately $25,000 to $35,000 in wagers per weekend (Tr. 1048-1049).

money from and paid money to bettors (Tr. 1169, 1171-1172, 1252, 1262, 1276-1277, 1279, 1367, 1417, 1427). Petitioner Whalen also "settled with" bettors (Tr. 1339-1343, 1352-1355).

Persons named "Jack" and "Mike" collected money from bettors and placed bets with Lay (Tr. 152-153, 1062, 1081, 1278, 1366). George Iantorno, a bookmaker (Tr. 1008), placed lay-off bets with Lay (Tr. 1009-1011).

ARGUMENT

1. a. 18 U.S.C. 1955 prohibits illegal gambling businesses that, *inter alia*, involve "five or more persons." Count III of the indictment in this case charged an illegal gambling business in 1972 and 1973. Petitioners Smaldone, Reeb, Villano, and Gardner were convicted on that count. At trial, the government contended that, in addition to those four, Waters (the "phone man") and his hiree, Rodriguez (or "Tom"), were involved, as were Shaner and Woodward.[5] Petitioners claim (Pet. 17-26) that if the jury had been properly instructed it would not have included Woodward or Shaner among the "five or more persons" whose participation in the illegal gambling business the government was obliged to prove. Petitioners also assert that, if it had been

[5] The government also contended that co-defendant Raso participated in the 1972-1973 gambling business, but Raso was acquitted and we do not seek to include him as one of the five individuals whose participation was necessary to the convictions under Count III.

properly instructed, the jury would have counted either Smaldone or Villano, but not both, as making up the "five or more persons," since in petitioners' view the evidence showed that those two petitioners participated in the gambling business *seriatim* rather than simultaneously. Petitioners appear to concede that Waters could have been properly counted (Pet. 22, n. 4), and they say nothing about Rodriguez. Those two, added to petitioners Reeb and Gardner, and either Smaldone or Villano, make "five or more persons." Thus, even if petitioners were correct in arguing that Woodward and Shaner should have been excluded, and that either Smaldone or Villano should have been counted, but not both, we submit that the government proved its case, for there is no basis for concluding that the jury might have included Woodward and Shaner among the "five or more persons" and not Waters and Rodriguez—whose connection with the gambling business was more direct—as well.

In any event, petitioners' objections to the district court's instructions are unpersuasive. Although the petition does not specify any particular respect in which the instructions were erroneous, we take petitioners' argument to be that the district court defined the word "conduct" too broadly, failed to distinguish among different categories of individuals who may have had dealings with the illegal gambling business, and thereby "directed" (Pet. 21) the jury to include persons who should not have been included among the "five or more persons" necessary to a Sec-

tion 1955 violation.[6] The court defined "conduct" as follows (Tr. 1699):

> As used in the statute, the term "conduct" means to operate, carry on, cause to function, or to play any role in the furtherance of the gambling business, whether the defendant is on the highest or the lowest level of activity. The term includes everyone who participates in the operation of the gambling business, regardless of how minor his or her role may be, and whether or not that person is labelled or termed an agent, a runner, a collector, a salesman, a phone man, a clerk, lookout, independent contractor, layoff man, or some similar term.

---

[6] In the district court, after the charge, defense counsel made the following objection (Tr. 1716-1717):

> MR. BARIS: * * * Your Honor, we will object to the word "conduct" as contained in your instructions.
>
> THE COURT: Very well.
>
> MR. BARIS: I think it is over-broad, and not within the concept of the statute, and includes many persons within illegal activity that should not have been included.
>
> There's no definition of words such as "independent contractors" and "layoff men" which I heard, terms that ought to be defined and are not known in the common knowledge of jurors.
>
> THE COURT: Well, have you got a definition of layoff men and independent contractors you would like to tender?
>
> MR. BARIS: I don't have one with me.

See also petitioners' brief in the court of appeals at page 11 ("* * * in the evidence, argument and instructions, there were no delineations of the various categories which may or may not be included. As a result, the convictions in this case resulted from the jury's being directed to include persons who must not under the law be counted * * *").

This definition was not overbroad. Congress intended Section 1955 to apply

> generally to persons who participate in the ownership, management, or conduct of an illegal gambling business. The term "conducts" refers both to high level bosses and street level employees.

H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 53 (1970). See *United States* v. *Box*, 530 F.2d 1258, 1264 (C.A. 5).

Petitioners assert (Pet. 18, 22) that Woodward and Shaner were mere bettors rather than participants in the illegal gambling business, but the district court clearly instructed the jury that bettors were not to be counted (Tr. 1699):

> The only person not included is a mere bettor who is entitled simply to his own winnings on his wagers, and who did not otherwise participate in the gambling business. As used in the statute, the term "finance", "manage", "supervise", "direct", and "own" are simply given their normal accepted meaning.

The jury may properly be assumed to have followed the court's instructions: if they counted Woodward and Shaner it was because they found those two to have been participants in rather than mere bettors with the gambling business. As the court of appeals correctly ruled (Pet. App. A2-A3), the evidence was clearly sufficient to have warranted such a finding (see pp. 4-5, *supra*). Thus, even assuming that the jury counted Woodward and Shaner, but not Waters

and Rodriguez, their conclusion that "five or more persons" were involved in the illegal gambling business was sound as a matter of fact and law.

Petitioners' claim that the jury may have counted both petitioners Smaldone and Villano, and that, if it did, then the verdict must be overturned, is also unpersuasive. Petitioners do not indicate where the record supports their contention (Pet. 14-15, 23-24) that Smaldone and Villano did not participate simultaneously in the gambling business. Presumably it is based on the testimony of Waters that after Villano went to jail on September 20, 1972, Smaldone began to perform some of his managerial duties (Tr. 439-442). Contrary to petitioners' suggestion (Pet. 23-24), however, this testimony did not oblige the jury to conclude that Smaldone and Villano were never involved in the gambling business together; rather, it supports the government's position that they participated in the business simultaneously, for it is unlikely that Villano would have turned over his managerial duties to a newcomer.

Petitioners assert (Pet. 23) that the decision below conflicts with that of the Fifth Circuit in *United States* v. *Bridges*, 493 F.2d 918 (C.A. 5). In *Bridges* the court held that under Section 1955 the government must prove that "five or more persons" participated in the illegal gambling business for at least 30 days: a gambling business that was conducted, for example, by three persons for 15 days and then by two other persons for the next 15 days would not fall within the reach of the statute. Petitioners argue

that the district court's instruction did not advise the jury of this requirement, and that in affirming their convictions the court below has therefore disagreed with *Bridges*.

Petitioners did not, however, object to the district court's instructions on this ground. The district court instructed the jury that the 30-day test "applies to the gambling business as an enterprise. It does not apply to any single defendant" (Tr. 1700). That instruction did not explicitly advise the jury that they had to find that five persons were involved on each of the 30 days the gambling business was in operation, but it was unquestionably correct (and in no way inconsistent with *Bridges*) in stating that the 30-day test "does not apply to any single defendant," and that is the only aspect of the instruction to which petitioners objected (Tr. 1717). Thus, petitioners failed to preserve and therefore waived the objection to the instructions that they now assert (see *Henderson* v. *Kibbe*, No. 75-1906, decided May 16, 1977, slip op. 8; Rule 30, Fed. R. Crim. P.). Moreover, on the facts of this case there is no conflict with *Bridges*, since the court below has simply ruled—as it should have—that to convict under Section 1955 the government need not prove that each individual defendant participated in the gambling business for the full 30 days.[7]

---

[7] The Sixth Circuit, in addition to the Fifth, has held that under 18 U.S.C. 1955 the government must prove that at least five persons were involved in the illegal gambling busi-

b. Under Count II, charging a conspiracy during 1973, the government alleged that the participants were petitioners Smaldone, Reeb, and Gardner, as well as Ziegler (the "phone man") and bookmakers Salinitro, Cappellano, and Smith. Petitioners Reeb and Gardner were convicted. Petitioners assert (Pet. 25-26) that it would have been improper for the jury to count Salinitro, Cappellano, and Smith. But those individuals were shown to have exchanged "line" information with the gambling business and to have regularly accepted "lay-off" bets from it (see p. 5, *supra*). That showing was sufficient to allow the jury to find that they were participants rather than mere bettors. *United States* v. *Turzitti*, 547 F.2d 1003

---

ness for all 30 days. *United States* v. *Tarter*, 522 F.2d 520. Both the Fifth and Sixth Circuits have also held that the government need not prove that any individual participant was so involved. *United States* v. *Marrifield*, 515 F.2d 877 (C.A. 5); *United States* v. *Mattucci*, 502 F.2d 883 (C.A. 6). In *United States* v. *Smaldone*, 485 F.2d 1333, 1351 (C.A. 10), certiorari denied, 416 U.S. 936, the court held that under Section 1955 the government does not have to show "that each conductor was involved in the gambling business for more than thirty days or generated at least $2000 gross revenue in a single day. These requirements refer to the gambling operation and not to individuals." In that case, as in this one, the litigated issue was not whether five or more persons must participate for more than 30 days, but whether each particular defendant must have participated for that period in order to be found guilty. There is, in sum, no basis for concluding that the Tenth Circuit would construe the pertinent requirements of Section 1955 differently from the Fifth and Sixth Circuits in cases raising these issues.

(C.A. 7), certiorari denied, April 18, 1977 (No. 76-1296); *United States* v. *Box*, *supra*.[8]

c. Petitioners Reeb and Whalen were convicted on Count I, charging an illegal gambling business in 1974. In addition, the government contended that Lay (the "phone man") as well as Jack and Mike (who collected money from bettors and placed bets with Lay) and Iantorno (a bookmaker who placed "lay-off" bets with Lay) were involved. Petitioners assert that it would have been improper for the jury to have counted Iantorno (Pet. 25-26). Aside from the fact that there were five participants even excluding Iantorno, he could have been properly counted for the same reasons that the jury could have properly counted Salanitro, Cappellano, and Smith as part of the illegal gambling business charged in Count II.

2. In November, 1973, telephone conversations between petitioner Reeb and Omaha bookmaker John Salanitro were intercepted pursuant to electronic surveillance on Salanitro's telephone authorized by order of the United States District Court for the District of Nebraska. Petitioners contend that evidence of these conversations was improperly introduced at trial due to lack of compliance with Title III of the

---

[8] *United States* v. *Leon*, 534 F.2d 667 (C.A. 6), said by petitioners to conflict with the decision below (Pet. 25), is distinguishable, for there the government did not establish that bets placed by a bookmaker were in fact "lay-of" bets (*id.* at 677).

Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.*[9]

a. First, petitioners contend (Pet. 27-28) that evidence obtained by means of the wire interception should not have been disclosed absent a disclosure order under 18 U.S.C. 2517(5), because the "offense" specified in the application and order of authorization was different from the "offense" to which the intercepted conversations pertained. But the order of authorization specified that the interceptions were to be undertaken to investigate violations of 18 U.S.C. 1955 by Salanitro, other named Omaha bookmakers, and "others as yet unknown." The intercepted conversations between Reeb and Salanitro were used at trial as evidence of a violation of Section 1955 involving, *inter alia*, Salanitro. Thus, the offense in connection with which the evidence was used was encompassed within the terms of the order. This case therefore does not present the question that petitioners propound—*i.e.*, whether an order under 18 U.S.C. 2517 (5) is required for use of intercepted conversations in connection with a factually distinct offense against the same statute as that specified in the order, and, if so, whether the failure to obtain a disclosure order is a ground for suppression of evidence. Compare

[9] Petitioner Reeb alone has standing to raise these issues, since none of the other petitioners were parties to the intercepted conversations or were named in the application. See 18 U.S.C. 2510(11), 2518(10)(a); *Alderman* v. *United States*, 394 U.S. 165; *United States* v. *Armocida*, 515 F.2d 29 (C.A. 3), certiorari denied *sub nom. Gazal* v. *United States*, 423 U.S. 858.

United States v. *Vento*, 533 F.2d 838, 854-855 (C.A. 3), and *United States* v. *Brodson*, 528 F.2d 214 (C.A. 7).

b. Petitioner Reeb also complains (Pet. 28-29) that the government failed to serve her with an inventory notice of the November 1973 interception, as required by 18 U.S.C. 2518(7)(b). As the court of appeals observed, however (Pet. App. A4), Reeb's voice was not identified until October 1975. At that time Reeb's counsel was advised of the wire interception evidence, was permitted to listen to the intercepted conversations in which Reeb participated, and was given transcripts of the intercepted conversations (Supp. Hearing (10/31/75) Tr. 23-25). Thus, Reeb was given more information than that to which she was entitled under Section 2518(7)(b). Furthermore, in *United States* v. *Donovan*, 429 U.S. 413, 438-439, this Court held that a good faith failure by the government to comply with the inventory notice requirement is not ground for suppression under 18 U.S.C. 2518(10).

c. Finally, petitioners contend (Pet. 29-33) that the government's application for authorization of electronic surveillance did not contain "a full and complete statement as to whether or not other investigation procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c). The requirements of this Section are satisfied if the application and its supporting affidavit, viewed in a practical and common sense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)),

demonstrate to the court that traditional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the identity of the participants therein. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Sklaroff*, 552 F. 2d 1156, 1159 (C.A. 5); *United States* v. *Turner*, 528 F.2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Robertson*, 504 F.2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F.2d 219, 224 (C.A. 8).

The court of appeals properly concluded (Pet. App. A5-A6) that this test was satisfied here. The affidavit of FBI Special Agent O'Brien outlined seven months of investigative activity, including physical surveillance, that had failed to produce sufficient evidence to sustain a prosecution. The affidavit also included information from five confidential informants, each of whom was unwilling to testify due to concern for his safety.[10] Finally, the affidavit stated that the bookmaking activities under investigation were conducted in a highly secret manner and that most of the individuals involved appeared to be "surveillance conscious." In short, the affidavit, which showed both that other investigative techniques had failed and that they were unlikely to succeed in the future, satisfied

[10] Because the reluctance of certain informants to testify was due to fear for their safety, rather than concern about possible prosecution, it is not clear that their full cooperation could have been obtained through use of subpoenas and grants of immunity.

the requirements of 18 U.S.C. 2518(1)(c).[11] See *United States* v. *Abramson*, 553 F.2d 1164 (C.A. 8), certiorari denied, June 27, 1977 (No. 76-1672), in which the affidavit involved in this case was upheld in connection with another prosecution. See also *United States* v. *Sklaroff*, *supra*.

3. Petitioners contend (Pet. 34-36) that the trial court improperly permitted the government to introduce evidence that Villano had been involved in bookmaking prior to the periods of time covered by the indictment. Under Rule 404(b), Fed. R. Evid., however, evidence of other crimes is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Here, Villano's prior bookmaking activity was properly admitted to show a continuing scheme or plan, and the duration of bookmaking activity was in turn relevant to show that the bookmaking businesses were of the type covered by 18 U.S.C. 1955. The district court confined the inquiry to the general nature of Villano's activity (see Tr. 268-269) and gave limiting instructions as to the purpose for which the evidence was admitted (see Tr. 325, 378-379).[12]

[11] The court of appeals properly distinguished (Pet. App. A5-A6) *United States* v. *Kalustian*, 529 F.2d 585 (C.A. 9), cited by petitioners (Pet. 31). There the affidavit was based primarily on the experience of federal agents in other gambling cases. In *United States* v. *Pezzino*, 535 F.2d 483 (C.A. 9), the Ninth Circuit held that an affidavit similar to the one here involved was sufficient to pass muster under *Kalustian*.

[12] Contrary to petitioners' assertion (Pet. 34 n. 5), the limiting instruction was not confusing (Tr. 378-379). The

4. Petitioners argue (Pet. 36-39) that the district court erroneously allowed leading questions on redirect examination. Petitioners do not, however, cite any instance in which leading questions were used on redirect examination to elicit testimony that was more damaging to them than that elicited on direct examination. Accordingly in the circumstances of this case, there is no need to consider the correctness of the court of appeals' ruling (Pet. App. A6) that the district court did not abuse its discretion under Rule 611, Fed. R. Evid., for petitioners have failed to show reversible error in any event.

5. Petitioners contend (Pet. 39-42) that the district court improperly refused to direct the government to disclose the identities of informants who had given information to FBI Agent Malone.

This Court held in *Roviaro* v. *United States*, 353 U.S. 53, that as a general rule the government is privileged to withhold the identities of its confidential informants, but that the privilege must give way "[w]here the disclosure of an informant's identity, or of the contents of his communication, is relevant

---

court charged the jury that evidence of bookmaking outside the times covered by the indictment was introduced "for the very limited purpose of showing a plan, scheme, or common operation." The court went on to instruct that the statements of any defendant may be considered against other defendants only if a concert of action was shown. Contrary to petitioners' suggestion, the existence of a conspiracy count is not a prerequisite for the latter instruction. *E.g.*, *United States* v. *Snow*, 521 F.2d 730, 736 (C.A. 9), certiorari denied, 423 U.S. 1090; *United States* v. *Snyder*, 505 F.2d 595 (C.A. 5), certiorari denied, 420 U.S. 993.

and helpful to the defense of an accused, or is essential to a fair determination of a cause * * *" (*id.* at 60-61). In this case there has been no showing that the identities of the informants would have been helpful to petitioners, and petitioners have offered no persuasive reason to believe that their interest in knowing the identities of the informants outweighed the government's interest in maintaining confidentiality. In these circumstances, petitioners were at most entitled to have the district court conduct an *in camera* inspection of the materials relating to the informants. See *United States* v. *Alvarez*, 469 F.2d 1065 (C.A. 9); *United States* v. *Poms*, 484 F.2d 919 (C.A. 4); *United States* v. *Edwards*, 503 F.2d 838 (C.A. 9), certiorari denied, 420 U.S. 977. The district court conducted such an examination and concluded that disclosure of the identities of the informants was unnecessary because none "could have any testimony which would be helpful" to petitioners (Pet. App. A6). That essentially factual determination does not warrant further review by this Court.

6. Relying on *Smith* v. *Illinois*, 390 U.S. 129, petitioners contend (Pet. 43-45) that the district court erred in refusing to permit defense counsel to ask FBI Agent Malone his home address. This Court's opinion in *Smith*, however, expressly recognizes the propriety of limiting cross-examination in the interests of protecting the witness (*id.* at 133, quoting *Alford* v. *United States*, 282 U.S. 687). A legitimate concern for the personal safety of a witness would appear to be one of the more compelling reasons for

restricting the scope of cross-examination. *Id.* at 133-134 (concurring opinion of Mr. Justice White, joined by Mr. Justice Marshall); *McGrath* v. *Vinzant*, 528 F.2d 681 (C.A. 1), petition for a writ of certiorari dismissed, 426 U.S. 902; *United States* v. *Crockett*, 506 F.2d 759 (C.A. 5), certiorari denied, 423 U.S. 824. Although an affirmative showing of potential danger may be necessary where the basis of concern was for the safety of the witness is not apparent (see *Smith* v. *Illinois*, *supra*, 390 U.S. at 133-134) (concurring opinion of Mr. Justice White, joined by Mr. Justice Marshall), such a showing is hardly necessary where, as here, both the nature of the offense and the occupation of the witness make the concern for the witness's safety obvious. *McGrath* v. *Vinzant*, *supra*.

Malone's name, occupation, and business address were on record. The narrow limitation upon cross-examination imposed by the district court was reasonably necessary for the protection of the safety of a law enforcement officer and cannot be said to have prejudiced petitioners in any respect.

7. Petitioners contend (Pet. 45-48) that the prosecuting attorney acted improperly when he called witness Jerry Woodward to the stand and asked him a question that he had reason to know Woodward would decline to answer on self-incrimination grounds. Woodward did decline to answer; upon the prosecutor's application he was granted immunity, and direct examination proceeded.

There was no impropriety in the action of the

prosecutor. In each of the cases petitioners cite (Pet. 47-48), the prosecutor called a witness with reason to know he would invoke his Fifth Amendment privilege, but with no intention of granting immunity. Such a situation poses the danger that, from the invocation of the privilege or from the prosecutor's questions, the jury will draw inferences that the defendant will be unable to rebut, since meaningful cross-examination of the witness is effectively precluded. This danger is not present where, as here, a grant of immunity follows the refusal to answer questions, for in such a case the defense has full opportunity to test the witness's testimony on cross-examination. Thus the court of appeals correctly rejected petitioners' claim in this regard.[13]

---

[13] Even where the government does not grant immunity, a witness's invocation of his privilege against self-incrimination is not *per se* reversible error. If the instances in which the privilege is claimed are not of great significance in the context of the entire trial and the government has not deliberately attempted to profit from the refusal of witnesses to testify, reversal is not required. *Namet* v. *United States*, 373 U.S. 179.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys.

SEPTEMBER 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 245703 62